

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: www.bcap.org.uk/The-Codes/BCAP-Code.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

50 Cent Music Videos

Greatest Hits TV, 22 June 2011, 09:00

Introduction

Greatest Hits TV is a music channel that broadcasts music videos and music based programmes. The licence for Greatest Hits TV is held by Mushroom TV Limited ("Mushroom TV" or the "Licensee").

Ofcom received two complaints about a quarter hour segment on this channel broadcast immediately after 09:00 devoted to music videos by the rap singer 50 Cent. One complainant was watching with their daughter. These complaints alerted Ofcom to the issues of offensive language and images of topless female performers included in music videos broadcast at this time.

On assessing this content, Ofcom noted the following:

Music Video: 'P.I.M.P.'

This music video included several images of topless female performers dancing in a sexualised manner. For example, there were repeated images of: 50 Cent, and another artiste, Snoop Dogg, dancing with two topless female performers in a sexualised manner; and 50 Cent in a close embrace with three topless female performers, while he fondled the breast of one of the performers. In addition, there were also images of two scantily-clad female performers being 'walked' like dogs by another scantily-clad female performer, by means of leashes connected to dog collars on their necks.

Music Video: 'I Like the Way She Do It'

This music video contained the following potentially offensive statement:

"It never enough she like it rough. We keep it going and we switch positions, listen".

Music Video: 'Disco Inferno'

This music video contained the potentially offensive word "*nigger*". In addition, during the three and a half minute music video there were numerous instances of sexualised images and nudity, including topless female performers caressing and kissing each other; and over 45 close up images of female performers in skimpy underwear gyrating their bare buttocks to camera, including two sets of images showing bottles of alcohol being poured over a female performer's crotch and bare buttocks.

Music Video: 'If I Can't'

This music video contained the following potentially offensive language: "*pussies*"; "*nigger*"; "*motherfucker*"; and "*fuck*". It also contained the following potentially offensive statements:

“Stand alone squeezin’ my pistol”;

“You gon be the next chump to end up in the trunk¹ after being hit by the pump²”, and

“Niggers on my dick more than my bitch”.

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

- Rule 1.3: “Children must also be protected by appropriate scheduling from material that is unsuitable for them”;
- Rule 1.14: “The most offensive language must not be broadcast before the watershed”;
- Rule 1.16: “Offensive language must not be broadcast before the watershed...unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed”;
- Rule 1.21: “Nudity before the watershed must be justified by the context”; and
- Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context”.

Ofcom asked Mushroom TV for its comments under the above Rules of the Code.

Response

Mushroom TV said that “of course [the content] fell short” of compliance with the rules of the Code “because the material was broadcast inadvertently”. The Licensee stated that the broadcast of this content was: “the result of an error during the reinstallation of the main video library following the replacement of our servers” in the wake of a recent robbery at the Licensee’s premises. Mushroom TV added that: “We would not attempt to justify the content as [it was] clearly inappropriate before the watershed”. The Licensee said that it had broadcast an on-screen apology for seven days from 24 July 2011.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for the content of programmes as appear to it best calculated to secure the standards objectives, including that “persons under the age of eighteen 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.

In reaching a decision in this case, Ofcom acknowledged the importance attached to freedom of expression in the broadcasting environment. In particular, broadcasters must be permitted to enjoy the creative freedom to explore controversial and challenging issues and ideas, and the public must be free to view and listen to those

¹ Trunk’ is the US term for boot of a car.

² Ofcom interprets ‘pump’ in this case to be a reference to a pump-action shotgun.

issues and ideas, without unnecessary interference. The Code sets out clear principles and rules which allow broadcasters freedom for creativity, and audiences freedom to exercise viewing and listening choices, while securing the wider requirements in the Act.

Ofcom has also had regard to the fact that music videos are an artistic and creative medium, which can and do sometimes contain challenging content which some may find offensive. As part of our consideration we took into account that music videos from the 'urban' and 'R&B' genre are well known for including mild sexual content and innuendo and are not generally aimed at a younger child audience. However, while music videos must have room for innovation and creativity, Ofcom does have a statutory duty with regard to all programmes, including music videos (whatever the genre), to ensure that under eighteens are protected and to enforce generally accepted standards so as to provide adequate protection for members of the public from the inclusion of offensive and/or harmful material.

Rule 1.3

Rule 1.3 of the Code states that "Children must also be protected by appropriate scheduling from material that is unsuitable for them". Therefore, Ofcom considered first whether this broadcast material was unsuitable for children. We had two sets of concerns with the content contained in these music videos.

Firstly, we considered that two of the music videos ('*P.I.M.P.*' and '*Disco Inferno*') included numerous images of a sexualised nature including: the singer dancing with topless female performers in an erotic manner; and 50 Cent in a close embrace with three topless female performers, while he fondled the breast of one of the performers. In addition, there were also images of two scantily-clad female performers being 'walked' by another scantily-clad female performer, by means of leashes connected to dog collars on their necks; topless female performers caressing and kissing each other; and (in '*Disco Inferno*') around 45 close up images of female performers in skimpy underwear gyrating their bare buttocks to camera, including two sets of images showing bottles of alcohol being poured over a female performer's crotch and bare buttocks. In Ofcom's view, the cumulative effect of these various images was to convey highly sexualised themes.

Second, we considered that the other two music videos under consideration ('*I Like the Way She Do It*' and '*If I Can't*') contained a number of statements, which in Ofcom's view, conveyed sexual and violent imagery. For example:

"It never enough she like it rough. We keep it going and we switch positions, listen";

"Stand alone squeezin' my pistol"; and

"You gon be the next chump to end up in the trunk after being hit by the pump".

Given the above, it is Ofcom's view that the content of these particular music videos was not suitable for children. Ofcom therefore went on to consider whether this material was appropriately scheduled so as to provide adequate protection to children from viewing this material.

As part of our consideration, we took into account that this content was broadcast at 09:00 during school term-time. In addition, we noted: the nature of this editorial content (and the highly sexualised nature of the content in particular); the material chance that there would have been children in the audience – some unaccompanied

– at this time of day; and the fact that the audience to this general music channel at this time would not have expected material of this nature (we noted that the Licensee acknowledged that this material was clearly not appropriate for scheduling before the watershed). The content was not appropriately scheduled and it therefore breached Rule 1.3 of the Code.

Rule 1.14

Rule 1.14 of the Code states unequivocally that “the most offensive language must not be broadcast before the watershed”.

Ofcom research on offensive language³ clearly notes that the word “fuck” and its derivatives are considered by audiences to be amongst the most offensive language. Similarly, the research shows that the word “pussy” is considered by many in the audience to be unacceptable before the watershed. Therefore, this language is clearly inappropriate when children might be in the audience.

In this case, Ofcom noted the words “*motherfucker*”, “*fuck*”, and “*pussies*” broadcast in the music video ‘*If I Can’t*’. Given that this content was broadcast well before the watershed, the broadcast of the most offensive words in this programme was therefore a clear breach of Rule 1.14 of the Code.

Rule 1.16

Rule 1.16 of the Code states that “Offensive language must not be broadcast before the watershed...unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed”.

In the music video ‘*Disco Inferno*’ the potentially offensive word “*nigger*” was broadcast, and in the music video ‘*If I Can’t*’ the words “*nigger*”, and “*Niggers on my dick more than my bitch*” were broadcast.

Ofcom’s research notes that the word “nigger” might be acceptable in some contexts pre-watershed. For example the research says that: “Participants...noted that the word ‘nigger’ is commonly used in rap songs and is not seen as unacceptable in this context”⁴. However, the research also notes that some participants objected to the use of the word ‘nigger’ at all on television. The research also found that the words “dick” and “bitch” might be acceptable for broadcast pre-watershed but that care needed to be taken over their use when children were likely to be watching⁵.

Ofcom considered firstly whether the use of this offensive language in the programmes was justified by the context; and second in any event whether the use of offensive language was too frequent for broadcast before the watershed.

As noted above, Ofcom considered that there was a material chance that children would be in the audience for this programme when broadcast. We also noted that the Licensee did not offer any editorial justification for the broadcast of this offensive language at this time. Therefore, we considered that the broadcast of the offensive language described above was not justified by the context, and it breached Rule 1.16 of the Code.

³ Audience attitudes towards offensive language on television and radio, August 2010, p.92 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>).

⁴ Ibid, p.106.

⁵ Ibid, p.90.

Rule 1.21

Rule 1.21 of the Code states that “Nudity before the watershed must be justified by the context”.

In this case, we noted that two of the music videos (*‘P.I.M.P.’* and *‘Disco Inferno’*) included numerous images of topless female performers dancing in a sexualised manner. For example: 50 Cent, and another artiste, Snoop Dogg, dancing with two topless female performers in a sexualised manner; and 50 Cent in a close embrace with three topless female performers, whilst he fondled the breast of one of the performers.

We noted that the Licensee did not offer any editorial justification for the broadcast of this content at this time. In addition, given the highly sexualised nature of this content, the time of broadcast, and the material chance of children being in the audience, we considered there was not sufficient context to justify the broadcast of nudity in this case. Therefore, the programme was in breach of Rule 1.21 of the Code.

Rule 2.3

Rule 2.3 of the Code states that “In applying generally accepted standards broadcasters must ensure that material which may cause offense is justified by the context”.

Ofcom considered first whether the content 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.

We considered that the music videos in this case contained various images and language which would have had the potential to be offensive to the audience. For example, as mentioned above, Ofcom’s research on offensive language clearly notes that the word “fuck” and its derivatives, are considered by audiences to be amongst the most offensive language; and that the word “pussy” is considered by audiences to be unacceptable before the watershed. In addition, we considered the highly sexualised images in two of the music videos (*‘P.I.M.P.’* and *‘Disco Inferno’*), as described above, had the potential to be offensive.

We noted that the Licensee did not offer any editorial justification for the broadcast of this content at this time. In addition, given the channel’s likely appeal to a broad range of viewers, we concluded that the audience for this channel was unlikely to expect the broadcast of numerous examples of highly sexualised imagery and instances of offensive language in a fifteen minute period after 09:00. Ofcom concluded that the context was insufficient to justify the broadcast of the offensive content in this case, and that Mushroom TV did not apply generally accepted standards. Consequently, the programme was in breach of Rule 2.3 of the Code.

In light of this case, Ofcom is putting the Licensee on notice that if there is any recurrence of similar compliance issues, we will consider taking further regulatory action.

Breaches of Rules 1.3, 1.14, 1.16, 1.21 and 2.3

In Breach

50 Biggest Selling RnB Hits of the Noughties

Kiss TV, 10 July 2011, 15:44

Introduction

Kiss TV is a music channel that broadcasts music videos and music based programmes. The licence for Kiss TV is held by Box Television Limited ("Box Television" or "the Licensee").

Ofcom received a complaint from a viewer about a music video broadcast in this programme on a Sunday afternoon. The music video was for the song '*I Don't Want You Back*' by the artiste Eamon. The complaint alerted Ofcom to the issue of offensive language included in a music video at this time.

On assessing this programme, Ofcom noted that the music video for the song '*I Don't Want You Back*' was broadcast. The following chorus was broadcast five times:

*"Fuck what I said it don't mean shit now
Fuck the presents might as well throw 'em out
Fuck all those kisses, they didn't mean jack
Fuck you, you hoe¹, I don't want you back".*

In addition, we noted the following lyrics in one of the verses:

*"You thought, you could keep this shit from me, yeah
You burnt bitch, I heard the story you played me, you even gave him head²".*

Ofcom considered 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 1.16: "Offensive language must not be broadcast before the watershed...unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed"; and
- Rule 2.3: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context".

Ofcom asked Box TV for its comments under the above rules of the Code.

Response

Box TV offered its "unreserved apologies for the inadvertent broadcast of the wrong version of the '*I Don't Want You Back*' video". The Licensee said that in this case the "transmission copy of the video was missing from our play out system, so a version

¹ 'Hoe' is a diminutive version of 'whore' and is commonly used as a derogatory term for a promiscuous female.

² Slang phrase meaning oral sex.

was taken from the 'deep storage' database. Unfortunately, the operator wrongly assumed that, as the video was on that system, it was cleared for transmission".

Box TV said that following this incident it had "reminded all staff that the procedure is that they must ensure any material retrieved from archive systems is re-checked to ensure suitability for transmission". In conclusion, the Licensee stated its belief that "the issue was one of human error, and not a considered editorial or compliance decision, which resulted in a breach of the Ofcom Code by Box TV".

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for the content of programmes as appear to it best calculated to secure the standards objectives, including that "persons under the age of eighteen 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.

In reaching a decision in this case, Ofcom acknowledged the importance attached to freedom of expression in the broadcasting environment. In particular, broadcasters must be permitted to enjoy the creative freedom to explore controversial and challenging issues and ideas, and the public must be free to view and listen to those issues and ideas, without unnecessary interference. The Code sets out clear principles and rules which allow broadcasters freedom for creativity, and audiences freedom to exercise viewing and listening choices, while securing the wider requirements in the Act.

Ofcom has also had regard to the fact that music videos are an artistic and creative medium, which can and do sometimes contain challenging content which some may find offensive. As part of our consideration we took into account that music videos from the 'urban' and 'R&B' genre are well known for including mild sexual content and innuendo and are not generally aimed at a younger child audience. However, while music videos must have room for innovation and creativity, Ofcom does have a statutory duty with regard to all programmes, including music videos (whatever the genre), to ensure that under eighteens are protected and to enforce generally accepted standards so as to provide adequate protection for members of the public from the inclusion of offensive and/or harmful material.

Rule 1.14

Rule 1.14 of the Code states unequivocally that "the most offensive language must not be broadcast before the watershed".

Ofcom research on offensive language³ clearly notes that the word "fuck" and its derivatives are considered by audiences to be amongst the most offensive language. Such language is unacceptable when children might be in the audience. In this case, Ofcom noted 20 instances of the word "*fuck*" broadcast within the music video in question. Given that this content was broadcast on a Sunday afternoon well before the watershed, Ofcom considered that it was likely that children would be in the audience.

The broadcast of the most offensive words in this programme was therefore a clear breach of Rule 1.14 of the Code.

³ Audience attitudes towards offensive language on television and radio, August 2010, p.92 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>).

Rule 1.16

Rule 1.16 of the Code states that “Offensive language must not be broadcast before the watershed...unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed”.

With regard to Rule 1.16, Ofcom considered firstly whether the use of offensive language in the programmes was justified by the context; and second in any event whether the use of offensive language was too frequent for broadcast before the watershed.

Ofcom’s research on offensive language notes that the words “shit” and “bitch” might be acceptable in some limited contexts pre-watershed⁴. However, the research also found that care needed to be taken over their use when children were likely to be watching. In this case, Ofcom noted six instances of the word “*shit*” within the music video in question and one instance of the word “*bitch*”. Ofcom also considered that the terms “*hoe*” and “*gave him head*”, although they had not been covered in Ofcom’s research, also had the potential to be offensive pre-watershed when children were likely to be watching, due to their sexualised and derogatory connotations. In this case Ofcom noted five instances of the word “*hoe*” and one instance of “*gave him head*” within the music video in question.

As noted above, Ofcom considered that it was likely that children would be in the audience for this programme. Given this, and the fact there were approximately twelve instances of offensive language broadcast within the space of one four minute music video, we considered that the broadcast of the various offensive language described above could not be justified by the context. Therefore, we considered that the programme was in breach of Rule 1.16 of the Code.

Rule 2.3

Rule 2.3 of the Code states that “In applying generally accepted standards broadcasters must ensure that material which may cause offense is justified by the context”.

Ofcom considered first whether the repeated bad language in this song 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 its derivatives are considered by audiences to be among the most offensive language. Therefore, Ofcom considered that the repeated use of this word clearly had a significant potential to cause offence to the audience.

In view of Kiss TV’s likely appeal to a broad range of viewers, we concluded that the audience for this channel was unlikely to expect the broadcast of the most offensive language 20 times in a song lasting under four minutes, transmitted in the mid afternoon. Therefore, Ofcom concluded that the context was insufficient to justify the repeated broadcast of the most offensive language and that Box TV did not apply generally accepted standards. Consequently, the programme was in breach of Rule 2.3 of the Code.

⁴ Ibid, p.90.

Ofcom does not expect any recurrence of similar compliance failures by Box TV.

Breaches of Rules 1.14, 1.16 and 2.3

In Breach

Storm Afternoons

Storm, 3 July 2011, 16:00

Introduction

Storm Afternoons is interactive daytime chat advertising content broadcast on the service Storm (Sky channel number 966). The service is available freely without mandatory restricted access and is situated in the 'adult' section of the Sky electronic programme guide ("Sky EPG"). The licence for the service is held by Chat Central Limited ("Chat Central" or "the Licensee").

Viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS"). The presenters generally dress and behave in a flirtatious manner and occasionally talk directly to the audience to attract PRS calls. For much of the time and when the presenter is talking to a caller, the studio sound is muted and music is played over images of the female presenter.

A complainant alerted Ofcom to the broadcast of offensive and racist language during *Storm Afternoons* on the afternoon of 3 July 2011.

After inviting viewers to contact the studio, the female presenter placed the microphone beside her but neglected to switch it to mute. As a result, her conversation with callers and a man off-screen was audible for approximately 14 minutes. During this time, the following clearly audible phrases were broadcast:

"I feel fucked"

"Oh fucking hell"

"I fucking hate this song. How the fuck can you dance to this in a club. Fuck off"

"I feel too fucked"

"I wish black guys called me. I get all the Paki"

Ofcom considered the material raised issues warranting investigation under the following BCAP Code rules.

- | | |
|-----------|---|
| Rule 4.2 | "Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards." |
| Rule 32.3 | "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." |

Response

The Licensee acknowledged that "not only had our compliance procedures not been followed but that the error had not been duly reported to the company management team." It said that upon being alerted to the incident by Ofcom, "all producers were

issued with a new compliance procedure to ensure that a similar mistake does not happen in the future.” It added that “Chat Central prides itself on its equal opportunities policy and that the language used by the presenter was wholly unacceptable, whether broadcast or used in the workplace and as a result of this the presenter was dismissed as soon as this incident came to light.”

Decision

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to require the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material. Ofcom has a duty to set such standards for the content of programmes 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” and another is that “persons under the age of eighteen are protected.” These standards objectives are contained 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. 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 of 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.

On 28 January 2011, Ofcom published detailed guidance on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat services (the “Chat Service Guidance”)¹. This clearly sets out what Ofcom considers to be acceptable to broadcast on these services, both pre- and post-watershed.

BCAP Code Rule 32.3

This 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.”

BCAP Code Rule 32.3 makes clear that children should be protected by relevant timing (and so appropriate scheduling) restrictions from material which is 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 EPG (e.g. the ‘adult’ section); any warnings; and mandatory restricted access. The Chat Service Guidance clearly states that daytime chat broadcasters should ensure that: “The presentation of daytime chat should always be suitable for wide audiences, that is for audiences including children and young persons. Therefore, the content should be suitable for children should they come across it unawares.”

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf>. A revised version of this guidance was published on 27 July 2011.

Ofcom's research² indicates that the word "fuck" and its derivatives are examples of the most offensive language. Similarly, in terms of discriminatory language, the word "Paki" was amongst those that were considered amongst the most offensive examples. Ofcom therefore considered the broadcast of such language when children may be watching was clearly unsuitable.

Ofcom then considered under BCAP Code Rule 32.3 whether relevant timing or scheduling restrictions were applied to these broadcasts by the Licensee. Ofcom noted that the content was highly offensive and clearly exceeded the expectations of the audience. Storm is situated in the 'adult' section of the Sky EPG. However, the material was transmitted without a mandatory access restriction at 16:00 when children may have been watching television, some unaccompanied by an adult. Taking these factors into account, Ofcom concluded that relevant timing and scheduling restrictions were not applied to the broadcasts so as to offer adequate protection to children and therefore the material was in breach of Rule 32.3.

BCAP Code Rule 4.2

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

In Ofcom's view - for the reasons set out immediately above - this content was clearly capable of causing serious or widespread offence against generally accepted moral, social or cultural standards.

Under BCAP Code Rule 4.2, in order to assess whether serious or widespread offence was caused against generally accepted standards, Ofcom then considered whether suitable scheduling restrictions were applied to this content by the Licensee.

Ofcom took into account that the language used was amongst the most offensive; and that it was broadcast on a service which is regulated as advertising under the BCAP Code where audiences would clearly not expect to come across such language before the watershed. Ofcom noted that Storm is positioned in the 'adult' section of the Sky EPG. However, in this case, given the material included examples of the most offensive language broadcast at 16:00 on a Sunday, the location of the channel in the adult section of the EPG was not sufficient to ensure that serious or widespread offence against generally accepted standards was not caused by this content. Ofcom was concerned at the degree of offence likely to be caused to viewers who might come across this material unawares.

Taking into account the factors above, Ofcom concluded that relevant scheduling restrictions were not applied so as to ensure that the material which was broadcast was not capable of causing serious or widespread offence against generally accepted moral, social or cultural standards. The material was therefore in breach of BCAP Code Rule 4.2.

Ofcom was particularly concerned that the repeated broadcast of the most offensive language appeared to go undetected by the broadcaster for approximately 14 minutes. Ofcom considered this raised serious questions about the robustness of its

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

compliance procedures. In view of the measures taken by the broadcaster in response to this incident, Ofcom does not expect further breaches of the BCAP Code.

Breach of BCAP Code Rules 4.2 and 32.3

In Breach

Ice Road Truckers

History+1, 29 and 30 June 2011, 16:00

Introduction

Ice Road Truckers is a documentary style factual television series consisting of 60 minute programmes which observe the ice road truck drivers of Canada at work. They compete between themselves to haul the greatest amount of equipment and supplies across a temporary road composed of frozen lakes before the weather begins to melt the ice.

A complainant alerted Ofcom to the use of the word “fucking” in the programme broadcast on 29 June 2011, and a further complainant alerted Ofcom to repeated offensive language such as “shit” in the programme broadcast on 30 June. Both programmes were shown at 16:00.

On reviewing the material on both dates Ofcom noted repeated instances where offensive language was bleeped. During the episode broadcast on 29 June there were approximately 26 instances of bleeped offensive language, and on 30 June approximately 30 instances. In addition during the broadcast on 29 June at approximately 52 minutes into the broadcast the word “*fucking*” was clearly audible, and there were four instances of the word “*shit*” during the broadcast on 30 June.

History+1 is a channel which broadcasts the same content already shown one hour earlier on the History channel (known as a +1 service). History is owned and operated by A+E Television Network UK (“AETN UK” or the “Licensee”), which is a joint venture between AETN UK and BSkyB.

Ofcom considered 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...”; and
- Rule 1.16 “Offensive language must not be broadcast before the watershed..., unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed”.

Ofcom therefore asked the Licensee how the content complied with these Rules.

Response

Regarding Rule 1.14, AETN UK stated that it fully appreciated that the most offensive language must never be broadcast before the watershed and took this incident, which occurred during the broadcast on 29 June, very seriously and had immediately investigated how it had occurred. The series, which had been re-licensed to the History channel earlier this year, had previously been complied four years ago when it had been edited and categorised as being appropriate for daytime transmission. However, on receipt of Ofcom’s complaint, it had become apparent to the Licensee that not all of the most offensive language had been masked.

As a consequence, AETN UK removed the entire series from air and reviewed it to ensure all the offensive language was masked. In addition, the Licensee had changed its policy so that all re-licensed material will be fully reviewed regardless of any previous compliance classification and prior to broadcasting it again.

While acknowledging that the series contained “a higher than average amount of offensive language”, the Licensee did not consider that the two programmes were in breach of Rule 1.16. The words used in these episodes varied in their level of potential offence and all examples of offensive language were bleeped so viewers could not identify the words. AETN UK stated that its policy was to bleep or mute offensive language for pre-watershed transmission. The series *Ice Road Truckers* and the History channel were aimed at an adult audience. BARB figures for the first half of 2011 showed that children represented only a 0.1% share of History’s viewing and, on the dates and times in question, BARB data for History+1 recorded a zero audience of children. The Licensee therefore considered that in a reality programme such as *Ice Road Truckers* the numerous instances of bleeped language across a 60 minute slot was not unduly excessive or likely to exceed the expectations of the regular audience of this well established series.

Nonetheless, the Licensee explained that this was the first broadcast of this series on the channel and it accepted that a “conscious decision” would now be taken to edit certain scenes to remove “unnecessary occurrences of compounding language” particularly where a scene contained an excessive amount of such language.

Further, the Licensee explained that the standard History service scheduled material in line with a policy that restricted certain daytime content to hours when children could reasonably be expected to be at school. *Ice Road Truckers* was scheduled for these hours on History. However on the History +1 service the episodes were broadcast an hour later when children may have returned from school. In light of this, AETN UK had decided to revise the hours when restricted daytime content can be broadcast. The broadcast of this restricted content on the History channel would now finish at 14:00 to ensure any content of a more adult nature shown on History+1 would conclude by 15:00.

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 “persons under the age of eighteen are protected”.

Rule 1.14

Rule 1.14 states that the “most offensive language must not be broadcast before the watershed”. Ofcom research on offensive language¹ notes that the word “fuck” and its derivatives are considered by audiences to be among the most offensive language. Such language is unacceptable before the watershed, whatever the audience profile of the channel.

Ofcom welcomes the action taken by the Licensee of complying afresh the whole series of *Ice Road Truckers*. However, Rule 1.14 of the Code states unequivocally that the most offensive language must not be broadcast before the watershed. The

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

broadcast of the word “fucking” in the programme broadcast on 29 June was therefore a clear breach of Rule 1.14.

Rule 1.16

Rule 1.16 states that offensive language must not be broadcast before the watershed, unless it is justified by context; and that, in any event, frequent use of such language must be avoided before the watershed.

With regard to Rule 1.16, Ofcom had to consider first whether the use of offensive language in the programmes was justified by the context; and second in any event whether the use of offensive language was too frequent for broadcast before the watershed.

Ofcom noted that there were four instances of un-bleeped offensive language (“shit”) during the broadcast on 30 June. The word “shit” is considered by audiences to be a mildly offensive term² and, over the course of an hour long documentary programme, Ofcom was of the view that four instances of this word was justified by the context of a reality documentary style programme covering the activities of male lorry drivers working in stressful conditions which was aimed at an adult audience.

Ofcom also noted however that overall there were approximately 26 examples of bleeped offensive language in the 29 June programme; and approximately 30 examples in the 30 June broadcast. Where offensive language is bleeped, viewers clearly cannot identify exactly which expletives are used. But viewers (including children) can of course guess from the context what the redacted words are. If the use of the offensive language in a programme is frequent, such that pre-watershed broadcast of the programme requires multiple bleeping, there can be a cumulative effect on viewers similar to that of the offence caused by repeated broadcast of the un-bleeped offensive language itself. Where frequent bleeping of offensive language is required for pre-watershed transmission, broadcasters may need either to edit the programmes more rigorously to take account of this cumulative effect, or consider whether the programme is not, in fact, appropriate for pre-watershed broadcast at all.

In this case, Ofcom considered that in the 29 June programme, approximately 26 examples of bleeped offensive language, and in the 30 June broadcast, approximately 30 examples of bleeped offensive language, and four un-bleeped instances of “shit” did amount to the frequent use of offensive language before the watershed. Such a frequent use of offensive language before the watershed was not justified by the context in Ofcom’s opinion: it exceeded audience expectations, even for a channel which attracts very few child viewers.

Ofcom is concerned that AETN UK appears to have thought it sufficient to rely on material the Licensee broadcast under a re-licensing agreement having been previously complied by another party. It is of course the clear responsibility of all holders of Ofcom licences to comply the content they broadcast.

Ofcom however noted that in this case the History channel: accepted that the use of offensive language in two programmes was excessive and it would be editing them appropriately as a result; and, was revising the transmission hours for content on the +1 service to ensure content aimed at an adult audience is not scheduled after 15:00 when children could be expected to have finished school.

² See footnote 1

In view of these measures to improve compliance, Ofcom was therefore of the view that the issues relating to Rule 1.16 should on this occasion be resolved.

Breach of Rule 1.14; issues relating to Rule 1.16 resolved

Resolved

Popstar to Operastar competition

ITV1, 5 June 2011, 20:00

Introduction

Popstar to Operastar was an entertainment series in which pop singers were coached to sing in an operatic style, and competed against each other.

On 5 June 2011, in the first edition of the second series, a viewer competition opened. The competition's prize was a trip to Verona to see two operas, take a tour of the city and enjoy £10,000 spending money.

The viewer competition offered four routes of entry: premium rate phone call, premium rate text message (or "SMS"), premium rate 'red button' (for Sky and Virgin cable customers) and free entry via ITV's website. The cost of the premium rate text message entry was £1 plus standard message rate.

A complainant told us that, having submitted a premium rate text entry, he received a text message response notifying him that a different viewer competition for the programme *Who Wants to be a Millionaire?* was closed.

Ofcom considered the material raised issues warranting investigation under Rule 2.14 of the Code which states:

Rule 2.14: "Broadcasters must ensure that viewers and listeners are not materially misled about any broadcast competition or voting."

ITV Broadcasting Limited ("ITV") was responsible for compliance of the programme on behalf of the ITV network for ITV1. We therefore sought a range of information from ITV about the arrangements for the competition, including: details of prior scrutiny of the competition's design and organization, as required by the Ofcom licence verification conditions; the numbers of entrants affected; the integrity of the aggregation of entries; and what charges might have been incurred by affected entrants.

We also sought the broadcaster's formal comments under the above Code rule.

Response

ITV explained that the *Popstar to Operastar* viewer competition opened in the first episode on 5 June 2011 and closed on 18 July 2011 at midday. Entry methods were by premium rate telephone, SMS and red button on Sky and Virgin Media with the free route of entry provided via itv.com.

The broadcaster told us that the competition was opened during the launch show on 5 June at 20:25. At around 21:30, ITV Customer Services called the Interactive Operations team managing the vote, and reported an unusually high number of calls from viewers attempting to enter via SMS. They were complaining they had been entered into the wrong competition. It transpired, ITV said, that they were in fact receiving an incorrect confirmation text suggesting that they had attempted to enter a *Who Wants to Be A Millionaire?* competition, which was in fact closed.

ITV Interactive Operations immediately contacted the SMS service provider, who confirmed that the short code in use was the *Millionaire* short code previously used, and that a closed competition had been left active in error by the service provider. This was corrected that same evening, and all subsequent entries were processed as usual, ITV told us.

In respect of financial harm, ITV said that those viewers who entered the competition via SMS before the problem was resolved were not charged the premium rate but did incur a standard rate message charge.

ITV said further that after internal discussion it had agreed that the appropriate remedy was to send out a number of free messages to affected entrants. These messages apologised, confirmed that the £1 premium charge had not been incurred but that a standard rate message charge (of ten or 12 pence) would have been applied, explained how affected entrants could get a refund of this standard rate message charge, and publicised the new short code for those who wished to enter again as well as the free entry web address.

ITV said that, in this way, it had provided for affected entrants to recoup the standard rate charge they had already incurred, and reminded them that they could still enter the competition (as they had clearly intended to) by either the originally selected paid route (SMS) or a free route. The broadcaster believed it was significant to note that no-one affected by the original “mechanical” problem was thereby excluded from the competition, in the sense that they had sufficient opportunity to re-enter at no greater cost than their original attempt.

In response to specific questions, ITV said that, as a result of the broadcast in question, there were 6,576 entries into the closed *Millionaire* competition before it was set to inactive, which then allowed viewers to enter the *Popstar to Operastar* competition correctly. Of that number, 48 people had claimed a refund, and 163 people had donated the money to charity.

ITV stressed that none of the SMS entries received into the closed *Millionaire* competition were included in the winner selection for the *Popstar to Operastar* competition, so aggregation (the gathering of entries via different routes) was unaffected.

As to prior scrutiny of the competition’s design and organisation, as required by the Ofcom licence conditions for verification, ITV said that the process followed for setting up the competition was a standard one for a competition format that has been run and checked many hundreds of times in the past.

ITV was informed that the service provider (the contractor operating the telephony services) had followed its standard procedures. These procedures have been verified by external third party verifiers as required by ITV’s licence.

However, ITV accepted that there had clearly been a problem. The closed *Millionaire* short code had not been picked up as still being active by either the service provider or by ITV. The testing had involved the use of a keyword rather than an A, B or C response to the multiple choice question. The ‘competition closed’ message would only have been triggered by an A, B or C entry and thus the problem had not been uncovered before transmission.

ITV said that it was ensuring that more thorough and reliable testing procedures were in place.

ITV believed its processes to be second to none in the industry, and that adequate protection for members of the public was a core concern. The broadcaster maintained that no process is wholly immune to human error or mechanical breakdown, but in this case the error that did occur was spotted, diagnosed and rectified very quickly indeed. ITV had taken prompt steps to mitigate any actual harm, which affected a relatively small number of entrants but did not affect the outcome of the interactive event itself, since we notified entrants of the problem and offered them the opportunity to re-enter and/or to obtain a full refund. The cost to such entrants was not a PRS charge, ITV said, but the relatively nominal cost of a standard rate text.

ITV regretted that the error had led to a temporary problem for some entrants via SMS, and that some viewers attempting to enter the competition by this route were not entered into it, leading in turn to some viewer confusion and inconvenience. However, it took the view that this issue did not invalidate the competition in its entirety. Had it considered otherwise, ITV stressed, it would have cancelled the competition and refunded all entrants. The broadcaster believed that the error regarding the SMS entry route was mitigated to the greatest degree possible, by informing affected customers promptly, and allowing them the choice of re-entering and/or claiming a full refund.

ITV did not consider that viewers were materially misled by the competition. The entry details of the competition stated in the programme were correct, it said. The temporary mechanical problem identified during broadcast did mean that some entrants received information about a different competition which ITV acknowledged may have been somewhat confusing, but this was rectified as quickly as possible, and thereafter, ITV said, entrants were given a clear explanation, and by following the original instructions given during the broadcast again, or those provided in the follow up texts, they would have been entered as usual.

In conclusion, ITV emphasised that it was very sorry that a small group of entrants were initially not entered into the competition, were given information relating to the wrong competition, and were charged for a standard rate message as a result. It had apologised to those viewers who complained on the evening, and as stated above further apologised to all affected entrants in writing.

The broadcaster said that this error was extremely unusual and as such wholly unrepresentative of its usually robust competition processes.

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 contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material”.

These objectives are reflected in, among other rules, Rule 2.14, which serves to prevent viewer competitions and voting schemes from misleading the audience in such a way as to cause material harm, such as financial loss.

In this case, ITV broadcast details of how to enter the *Popstar to Operastar* competition including an SMS entry route using the same SMS short code as a closed *Who Wants to Be a Millionaire?* competition that had been left active erroneously. As a result, 6,576 SMS competition entries were submitted by viewers who had decided to pay a premium rate to enter the *Popstar to Operastar* competition, but whose entries were not submitted into that competition due to the technical error.

These SMS entrants were therefore materially misled that they could pay to enter the *Popstar to Operastar* competition, when in fact, due to the error, their entries were not included.

Ofcom noted that ITV sought to argue that the affected entrants were “a small group”. In Ofcom’s view, 6,576 was a reasonably high number of affected entries. We also disagreed with ITV’s view that these entries were “not initially entered into the competition”. It appeared to Ofcom that these entries plainly were not entered into the competition due to the error. It was left to the viewers in question to decide whether or not they wished to re-enter the competition.

We then examined factors, and actions taken by ITV, that would have mitigated the potential for harm. Ofcom noted that none of the affected entrants were in fact charged the premium rate entry charge, and therefore the financial harm in this case was relatively limited, as the standard rate message charge that had been applied was likely to have been ten or 12 pence in each case.

Further, we took account of the timely steps ITV took on the night to let all the affected entrants know how they could recover the standard rate message charge and how they could enter the competition again if they wanted to.

We also noted the steps ITV has taken to ensure that its service provider undertakes more reliable testing procedures to prevent any recurrence of this issue in future.

In the circumstances, Ofcom considered the matter resolved. However, we do not expect any recurrence of this issue.

Ofcom is taking this opportunity to reiterate once again to all broadcasters that we expect them to exercise the utmost care in the conduct of audience competitions and votes, in particular where broadcasters invite viewers or listeners to pay to participate.

Resolved

Resolved

Sky News

Sky News, 26 July 2011, 18:30

Introduction

Sky News is a 24 hour rolling news channel operated by British Sky Broadcasting Ltd ("Sky").

During routine monitoring, Ofcom noted that news coverage of the Utoya Island massacre in Norway included an interview via a video call. Whenever the interviewee was shown full screen, the words, "VIA SKYPE", were displayed almost continuously in a caption in the top right-hand corner. The caption was of a similar size to the chest caption in the lower part of the screen indicating the interviewee's name.

Sky confirmed that none of its references to Skype were broadcast as part of a product placement arrangement.

Ofcom therefore considered that the material raised issues warranting investigation under Rule 9.5 of the Code, which states:

"No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from:

- the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or
- the manner in which a product, service or trade mark appears or is referred to in programming."

We sought the broadcaster's comments under this rule.

Response

Sky said that, as part of its coverage of the events in Norway, it interviewed a woman whose daughter had been involved in the Utoya Island massacre. During the massacre, the woman had been in constant communication by text with her daughter, who had been on the island at the time of the shootings, but had escaped unhurt. The broadcaster therefore wanted the mother to tell their stories.

As the woman lived in northern Norway (and Sky was based in Oslo) the interview took place via Skype, which the broadcaster said it used in circumstances when it was "impossible or impractical to send a ... camera crew to a location."

Sky added that it had high production values for picture and sound quality and the broadcaster therefore considered it important, from an editorial perspective, to inform viewers of precisely what was being broadcast. It considered this was becoming increasingly important, as more of Sky's audience viewed the HD version of the channel, which made any differences in picture and sound quality more prominent.

The broadcaster noted that, while Skype did not charge broadcasters for using its 'voice and video call' service, Skype's Broadcast Terms of Service included the broadcaster agreeing to the following requirement:

"...except where prohibited by law ... With respect to any audio-visual Program ... that uses or includes a visual depiction of the Skype Software, you shall place the Skype logo so that during such use it shall appear, scaled proportionately and to a reasonable size so that it is clearly legible, on the lower right hand side of the screen in which the Skype Software is shown..."

Sky added that, while it was subject to this requirement, it had "interpreted the provision in such a way that [it did] not include the actual Skype logo", but included the visual reference, "VIA SKYPE", in the broadcaster's own type-face, in the top right-hand corner of the screen. Further, it noted that, in this instance, the news presenter had also introduced the interview with the words, "...joining us now via Skype..."

The broadcaster said it did not consider the broadcast was in breach of Rule 9.5, noting in particular that:

- Skype was used very infrequently in Sky's output;
- no fees were paid for its use;
- there was strong editorial justification to alert the audience to the fact that they were watching material of inferior quality to that normally provided by a professional camera crew, with the difference being greater for HD viewers;
- the word, 'Skype', had become common parlance for 'video conferencing', being "a noun which has become a verb", and referring to Skype (rather than to a video-conference) was "the simplest, clearest and most accurate way of explaining to viewers the sub-optimal technology that [was] being used to conduct an interview"; and
- when using Skype, the words "VIA SKYPE" appeared on-screen, rather than Skype's logo.

While Sky acknowledged that the interview in this instance was unusually long (approximately ten minutes), and the caption stating, "VIA SKYPE", was therefore screened more than in most such interviews, it considered that this "[did] not negate the need to inform viewers, especially those joining part-way through..." The broadcaster added that it understood the need to ensure undue prominence was not given to Skype, "hence [its] decision – unlike some other news broadcasters – not to use the actual Skype logo", which it considered "unnecessary for the conveyance of ... otherwise important information for the viewer."

Nevertheless, Sky said it had "undertaken analysis of captions that refer to commercial products, such as Skype", to determine whether viewers were best served by their inclusion for a part of the time when interviewees were shown full screen, rather than throughout such periods. The broadcaster said it had "reached the view that less prominent references to services such as Skype will provide a better viewer experience", adding that it had concluded "reduced prominence will better ensure compliance with Rule 9.5 of the Code" and Sky had therefore "taken measures to ensure this is the case."

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 specific standards objectives, one of which is “that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with.”

Article 19 of the EU Audiovisual Media Services (AVMS) Directive requires, among other things, that:

“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.”

This is reflected in, among other requirements, Rule 9.5 of the Code, which prohibits the undue prominence of products, services or trade marks in programming. Such undue prominence can arise if there is no editorial justification for referring to the product(s), service(s) or trade mark(s), or from the manner in which they are referred to.

Ofcom noted that Sky had received no payment or other valuable consideration from Skype for reference on air to its brand.

We also noted that, while Skype’s Broadcast Terms of Service required broadcasters to refer to Skype in programmes that included its video call service, they also acknowledged the primacy of statutory provisions relevant to individual broadcasters.

Ofcom acknowledged that Sky wanted to explain to its viewers any variation in its sound and/or picture quality, particularly when video call services such as Skype were used only very occasionally in its programming.

However, we noted that, in this instance, the presenter introduced the interview with a clear reference to the fact that it was to be conducted via Skype (i.e. *“Well, joining us now via Skype from Harstad in Northern Norway is...”*).

Further, we noted that the discussion that followed frequently featured the presenter and interviewee in a split screen, with surrounding graphics, which included a caption (under the split screen) that clearly identified their separate locations (i.e. *“SKY NEWS CENTRE LIVE HARSTAD, NORWAY”*).

In Ofcom’s view, the presenter’s verbal reference to Skype, together with the superior technical quality of the content from the studio and surrounding graphics in the split-screen sequences were likely to have been sufficient for viewers to understand that there was a difference in production quality between the two locations. We considered that viewers were therefore likely to have understood that any full screen display of the live link from Northern Norway was not going to be of Sky’s normal technical standard, without the need for the caption to be on-screen throughout the full screen sequences in question.

Ofcom acknowledged that Sky did not use the Skype logo itself, which served to limit the prominence given to the brand to a certain degree. Nevertheless, we considered there was little editorial justification for displaying the brand name, ‘Skype’, in a caption throughout the full screen sequences of live footage from Northern Norway during this ten minute interview.

Ofcom therefore welcomed Sky's decision to reduce in future the prominence of references to services such as Skype, with a view to ensuring compliance with Rule 9.5 of the Code.

In light of the remedial action taken by the broadcaster, we consider the matter resolved.

Ofcom reminds broadcasters that references to material broadcast 'via webcam' or 'via video link', for example, are unlikely to raise issues under Rule 9.5 of the Code, but any visual and/or oral brand reference should be both editorially justified and brief.

Resolved

Fairness and Privacy Cases

Upheld in Part

Complaint by A Share & Sons t/a ScS and Mr Neil Heffernan made on their behalf by Ms Marie Matheson

Mary Portas Secret Shopper, Channel 4, 26 January 2011

Summary: Ofcom has upheld part of this complaint of unfair treatment made by Ms Marie Matheson on behalf of A Share & Sons t/a ScS ("ScS"). It has not upheld complaints of unwarranted infringement of privacy made by Ms Matheson on behalf of ScS and Mr Neil Heffernan.

In this edition of *Mary Portas Secret Shopper*, in which the presenter works with well known British brands and high street stores to "*give shoppers the service they deserve*", Ms Portas was looking at sofa stores. Ms Portas visited a store owned by ScS, where she carried out secret filming, and gave her views on what she considered to be the unsatisfactory customer service she had experienced there.

Ms Matheson, a director of ScS, complained that the company was treated unfairly in the programme as broadcast. She also complained that the company's privacy was unwarrantably infringed in the making of the programme and that Mr Neil Heffernan's privacy was unwarrantably infringed in the programme as broadcast.

In summary, Ofcom found the following:

- The suggestion in the programme that ScS was one of the companies that had not had "*the balls*" to participate in the programme was unfair as there was no evidence that ScS had been offered such an opportunity.
- The use of secretly filmed footage to suggest that the company encouraged insurance fraud was not fair or justified, as the sales assistant was accurate in his description of the insurance cover offered.
- ScS was not given an appropriate and timely opportunity to respond to the allegation about the company encouraging insurance fraud, but no unfairness arose as ScS's denial was included in the programme.
- The secret filming at the ScS store was justified by the findings of a researcher and the public interest in the poor levels of customer services offered by ScS and there was therefore no unwarranted infringement of the company's privacy in the making of the programme.
- The inclusion of unobscured footage of store manager Mr Heffernan was justified, given his dealings with Ms Portas and his position as manager of the store.

Introduction

On 26 January 2011, Channel 4 broadcast an edition of *Mary Portas Secret Shopper*, in which the presenter works with well known British brands and high street stores to get shoppers "*the service you deserve*". In this edition Ms Portas was looking at sofa stores and worked with one chain, CSL, to make improvements in its customer

service. Ms Portas said that she had spoken to six retailers but that only CSL had *“had the balls”* to take part.

The programme followed Ms Portas as she worked with CSL and showed the changes that the company had made to improve its customer service. The programme also included secretly filmed footage of other stores, including one owned by A Share & Sons t/a ScS (“ScS”), which Ms Portas said had 97 stores across the UK. A salesman at one of the ScS stores told Ms Portas during some of this footage that he did not think a cream sofa would be *“that bad”* for her teenage son’s university digs. She said in commentary that she felt he was more interested in his commission than what was best for her. The salesman said he would work out a price and his manager then spoke to Ms Portas with a view to closing the deal. The manager gave a price, which he said was for a purchase that evening, *“cos it’s been a quiet night”*. Ms Portas said in commentary that this was *“classic hard sell, accompanied by poor advice”*. She said that she had received disappointing service at the stores she had visited but that it was about to get *“much worse”*. Footage was then included of her discussions about insurance cover and Ms Portas’ conclusion that staff at a number of stores were encouraging her to lie in order to make an insurance claim that would be accepted.

Footage of the interior and exterior of ScS stores was shown on a number of occasions.

Ms Matheson, a director of ScS, complained that the company was treated unfairly in the programme as broadcast. She also complained that the company’s privacy was unwarrantably infringed in the making of the programme and that Mr Neil Heffernan’s privacy was unwarrantably infringed in the programme as broadcast.

The Complaint

ScS’s case

Unjust or unfair treatment

In summary, Ms Matheson complained that ScS was treated unjustly or unfairly in the programme as broadcast in that:

- a) The company was unfairly portrayed as secretly filmed footage was included and used to suggest unfairly and wrongly that the company encouraged insurance fraud. Ms Matheson said that, although it was clear that the salesman’s response was a throwaway line in response to a flippant question, the advice given was correct as the warranty did provide protection from accidental staining. However Ms Portas went on to suggest that ScS was encouraging people to lie on insurance claim forms, which was a criminal act. There was no reason for her to have reached that conclusion from the footage.
- b) ScS was not given an appropriate and timely opportunity to respond to this allegation. Despite the fact that the footage had been filmed 10 weeks earlier, the programme makers wrote to ScS on 20 January 2011 asking for a comment within 24 hours.
- c) Ms Portas stated during the programme that she had spoken to six furniture retailers about featuring in the programme, but that only CSL *“had the balls”* to participate. This gave the impression that ScS had been invited to take part but had refused, so that there had been no alternative but to film secretly in ScS

stores. Ms Portas had not in fact approached ScS and the first the company had heard about the programme was when the programme makers wrote to them on 20 January 2011.

Unwarranted infringement of privacy

In summary, Ms Matheson complained that the company's privacy was unwarrantably infringed during the making of the programme in that:

- d) The programme makers filmed secretly in ScS stores and made no effort to contact the company about participation in the programme.

Ms Matheson also complained that Mr Heffernan's privacy was unwarrantably infringed in the programme as broadcast in that:

- e) Despite the fact that the programme's aim was to target Britain's retail bosses, footage of Mr Heffernan, one of the company's managers, was included in the programme, in which his face was visible in its entirety.

Channel 4's case

Unjust or unfair treatment

In summary, Channel 4 responded to the complaint of unjust or unfair treatment in the programme as follows:

- a) Channel 4 first responded to the complaint that the company was unfairly portrayed in that secretly filmed footage was included and used to suggest unfairly and wrongly that the company encouraged insurance fraud.

Channel 4 said that nothing in the programme suggested that ScS, as a company, encouraged insurance fraud. However, it was Ms Portas' honest opinion, formed by what she had seen and been told, that the sales assistant concerned was, like two other sales people in other stores, encouraging her to commit insurance fraud.

Channel 4 said that the ScS sale assistant's advice effectively meant that if Ms Portas wanted to make an insurance claim that would be accepted, she should say there had been an accident, whatever the true cause, and that if she kept quiet about it, she would get away with it. There was no basis for the suggestion that the question was flippant or the response a "throwaway" remark. Ms Portas formed the view that the sales assistant was trying to encourage her to commit fraud in the future so that she would be more likely to complete the purchase.

Channel 4 said that the sales assistant used the phrase "*but I never told you that*" because he knew he was encouraging a potential purchaser of insurance to make fraudulent claims in the future. Channel 4 said that, even if Ms Portas was wrong in her interpretation of the sales assistant's words, she was entitled to state her honestly held opinions and that viewers would have been able to make up their own minds about Ms Portas' opinion.

- b) As regards the complaint that ScS was not given an appropriate and timely opportunity to respond to the allegation that the company encouraged insurance fraud, Channel 4 said that the process of making a television series such as *Mary Portas Secret Shopper* was complex and that the finished programme was not

signed off until the day of transmission. The fact that footage was shot at a particular time did not mean that any attention was given to the detail of that footage or its place in the programme at or around the time of filming.

Channel 4 said that the first edit of the programme was not compiled until 20 January 2011 and that letters were then drafted to each organisation about which serious allegations might be made in the final programme. ScS was sent a letter requesting input on 20 January 2011 and Ward Hadaway Solicitors (“Ward Hadaway”) responded on behalf of ScS the next day. Ward Hadaway did not ask for further time to deal with the allegations, but complained about timing, accused Ms Portas of misconduct and demanded access to the programme prior to broadcast or a re-edit of the programme. The other sofa retailers were able to respond in the time given to ScS and that the issues raised with ScS were not complex, required no particular investigation or examination and were not fact specific.

Channel 4 said that the allegations were put to ScS as soon as possible and that ScS did not respond meaningfully to any of the matters raised and had not indicated how any extra time would have made a difference to their ability to or interest in a proper response. In any event, Channel 4 had ensured that what was known of ScS’s attitude to the various matters which were part of the broadcast was fairly represented in the broadcast.

- c) Channel 4 next responded to the complaint that Ms Portas stated during the programme that she had spoken to six furniture retailers about featuring in the programme, but that only CSL “*had the balls*” to participate, giving the impression that ScS had been invited to take part but had refused, when Ms Portas had not approached ScS.

Channel 4 said that in July and August 2010 the production company had contacted sofa retailers CSL, Harveys, Sofa Workshop, DFS, Furniture Village and Multiyork with a view to ascertaining whether or not they would be prepared to work with Ms Portas in-store to improve the delivery of customer service to their customers. The production team had intended to write to ScS, but the production company was unable to confirm that they did so and ScS maintained that they did not receive any such communication. Channel 4 and the series producer did not become aware until 24 January 2011 of ScS’s position that they had never been contacted about participation in the programme.

Channel 4 said that the phrases “*has the balls to let me in*” and “*of six leading sofa superstores I approached*” occurred in different contexts in different parts of the programme. Channel 4 also said that five of the top UK sofa retailers were visually represented in the programme, rather than six or more, so that viewers would have been aware that the list of possible companies approached by Ms Portas could be greater than the list of companies represented in the programme.

Channel 4 said that there was no credible basis for the suggestion that a reasonable viewer would have thought that ScS did not have “*the balls*” to let Ms Portas fix their standards of customer service and that ScS had never suggested that it would have been minded to work with Ms Portas should the opportunity have arisen.

Unwarranted infringement of privacy

In summary, Channel 4 responded to the complaint that the company's privacy was unwarrantably infringed during the making of the programme as follows:

- d) In response to the complaint that the programme makers filmed secretly in ScS stores and made no effort to contact the company about participation in the programme, Channel 4 said that it did not accept that ScS, as a private company, enjoyed any right to privacy pursuant to Article 8 of the Human Rights Act 1998 and that English courts had not yet ruled definitively that such privacy rights existed for corporations. In these circumstances, Channel 4 said it could see no basis for the suggestion that private corporations ought to have rights to privacy.

Channel 4 said that, in any event, the secret filming carried out on ScS premises was justified and in the public interest and met the two relevant requirements of the Ofcom Broadcasting Code, namely that there must be justification for the secret filming and appropriate public interest in the relevant subject.

Channel 4 said that a researcher from the programme making team visited the ScS store in Rotherham on two occasions. On the first visit, she showed interest in a cream chenille and corduroy effect fabric sofa, the price ticket on which said it was £399 and that the "After Promotion Price" would be £999. Contrary to advice given by the Association of Master Upholsterers, the sales assistant told the researcher that the sofa would be suitable for a household with cats if she purchased ScS's "Guardsman" protection cover. The sales assistant told her "you couldn't claim on the insurance if you said the cat constantly scratches but you could say, for instance, that a firework went off outside, the cat was scared and accidentally scratched the sofa", thereby advising her to lie to ensure acceptance of an insurance claim. The researcher called the Guardsman policy advice line and was informed that only one incident of pet damage would be covered, although the sales assistant had not made this clear to her.

The researcher asked if the promotion on the sofa would end soon and the sales assistant advised her that she should buy the sofa that day to be sure she could get it at that price. However, at the time of broadcast, the sofa was still advertised at the same "promotion" price.

When the researcher asked what would happen if there were difficulties in getting the sofa into her flat, the sales assistant told her that if the delivery man could not get it in to her flat "just don't sign for it, you'll be fine". However, the researcher telephoned the ScS helpline and was informed that if the sofa was too large to get inside the property, it would be returned and the customer would be charged for delivery, whether or not the sofa was actually delivered. The customer would then be given an option of choosing another item of furniture and paying another delivery charge or receiving an 80% refund.

On her second visit to the Rotherham store, the researcher asked the sales assistant what he thought would be appropriate for her student daughter in her university flat. He showed her a cream and brown sofa, which was on sale on a promotion at £399. The ticket said its "After Promotion Price" would be £799. On this occasion the researcher was again given incorrect information about the sofa, the insurance cover and the duration of the promotion price.

When the researcher visited the ScS store in Leeds, she was given incorrect information about the sale that was currently taking place, the insurance cover and whether her deposit would be refunded if the sofa did not fit into her flat.

Channel 4 said that the researcher had established that there were real issues with customer service standards at ScS and that there was every reason to believe that secret filming on ScS premises would reveal further material evidence about shortfalls in customer service. In accordance with Channel 4's long established procedures, the programme makers had made a written application to Channel 4 for approval for secret filming. The application was reviewed by senior personnel and authorisation was given for the secret filming to proceed. Channel 4 said that the investigation and discussion of appropriate standards of customer service in retail situations were matters in the public interest and that what customers could do to ensure appropriate customer service and what customers should look out for to ensure that the retail advice they receive was appropriate were questions that it was in the public interest to explore.

- e) Channel 4 then responded to the complaint that footage of Mr Heffernan, manager of the ScS store shown in the broadcast, was included in the programme, in which his face was visible in its entirety.

Channel 4 said that the aim of the programme was not to "target Britain's retail bosses". The programme aimed to: identify failings in retail customer service; demonstrate how improvements could be made without seriously impacting on profits; empower consumers to demand appropriate customer service; and to send a message to bosses that good customer service ought to be the norm in the UK. Channel 4 said that the filming in ScS premises was appropriate and in accordance with the aim of the programme, and, for the reasons given under the response at head d) above, in the public interest.

Channel 4 noted that the only complaint made concerned the failure to obscure Mr Heffernan's face in the broadcast and said that the only types of person identified in any secret filming included in the programme were people who were engaged in wrong-doing or managers who could be expected to be conveying the "company line" in relation to customer service standards. Mr Heffernan was the manager of the store and represented ScS to the outside world, so that what he did and how he behaved reflected adversely or favourably on ScS depending on the circumstances. His identity was, therefore, not obscured.

Channel 4 said that nothing shown in the broadcast could be considered private. Mr Heffernan joined Ms Portas on the open shop floor. He did not talk quietly or confidentially, so that anyone walking past could have heard the exchange in full. He did not reveal any ScS secrets or patents or confidences. Channel 4 said that Mr Heffernan's attempt to exert pressure on Ms Portas to purchase on the spot was classic hard sell and it was in the public interest to make customers aware of the technique and its ramifications.

Channel 4 said that seeing the face of the person pushing the hard sell was important, as it allowed the viewer to see the calm way in which the hard sell was made to seem to be the appropriate way to proceed. One of the important messages from the programme was that things were not always as they seemed and that the kind manager seeking to make a special once only deal for a customer may be doing no more than engaging in classic hard sell.

Channel 4 said that Mr Heffernan was filmed on the shop floor, a public space in the sense that any member of the public on the shop floor could have overheard the conversation between Mr Heffernan and Ms Portas, which was not private. Channel 4 said that the deal Mr Heffernan proposed to make with Ms Portas and its terms may have been private, but that there was a clear public interest in understanding that deal. Channel 4 said that the manner in which Mr Heffernan spoke, his body language and his way of interacting with Ms Portas were not private matters and that how he looked as he went about his business on the shop floor was not a matter about which Mr Heffernan could have any realistic expectation of privacy.

Channel 4 said that this was not a case where a private conversation conducted behind closed doors in an office had been covertly filmed or where the nature of the conversation, while conducted in a public space, dictated a reasonable expectation of privacy. Nor was it a case where confidential company documents, processes or procedures had been inadvertently revealed during the course of a discussion on a shop floor or where an inept or inexperienced staff member had made silly errors which might reflect badly on the company which employed him/her. It was a case where Mr Heffernan, in a manner and with an ease that suggested great comfort and familiarity with what transpired, engaged in hard sell tactics with a potential customer on the shop floor, where anyone present could have heard every word spoken by Mr Heffernan had they so chosen.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

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

Unjust or unfair treatment

Ofcom considered whether the broadcaster's actions were consistent with its obligation to avoid unjust or unfair treatment of individuals and/or organisations in programmes as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code").

- a) Ofcom first considered the complaint that the company was unfairly portrayed in that secretly filmed footage was included and used to suggest unfairly and wrongly that the company encouraged insurance fraud. Although it was clear that the salesman's response was a throwaway line in response to a flippant question, the advice given was correct as the warranty did provide protection from accidental staining. There was no reason for Ms Portas' to have concluded from the footage that ScS was encouraging people to lie on insurance claim forms, which was a criminal act.

In considering this part of the complaint, Ofcom had regard to Practice 7.9 of the Code, which states that when 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 first noted the relevant part of the programme. Having looked at examples of what she considered to be poor customer service in a number of different shops, Ms Portas said:

“So far I’ve had disappointing service, but it’s about to get much worse...At three of the chains, I felt I was encouraged to buy fabric protection insurance and to lie if I wanted my claim to be accepted”.

The programme then included footage of the following conversation at one store:

Ms Portas: *You are covered for pets?*

Sales assistant: *Yes, if your pet chews it, you’ve got one cover against it. If they rip it I would just say it was me anyway.*

At the ScS shop, Ms Portas had the following conversation:

Ms Portas: *Every week you can drop a stain on it, and it’s covered?*

Sales assistant: *Yeah, they’ll come out and clean it, yeah.*

Ms Portas: *Even if he’s been negligent, a bit of a twit drinking away?*

Sales assistant: *All he’s gotta say is, it was an accident, but I never told you that though.*

Ms Portas: *No, ok, you never told me that.*

Footage of Ms Portas discussing insurance in another shop was shown:

Ms Portas: *You know if you don’t find the Coke mark until next week?*

Sales assistant: *Oh yeah. So you pick the phone up and say yesterday we spilt some coke on it and we’ve tried cleaning it and it’s left a mark...right we’ll send somebody out and they sort it on site.*

In voiceover Ms Portas then said of this conversation and similar ones in two stores belonging to other chains:

“Each time it sounded to me like I was being encouraged to lie, but if I did, it would be insurance fraud. I can’t believe what I’ve just seen. They are encouraging customers to commit a criminal act... I think this is one of the worst retail industries I’ve worked on”.

In view of Ms Portas’ final remark in this section, Ofcom considered that viewers would have been likely to understand that she was alleging that ScS, as a company, and the industry in general, was encouraging customers to commit

insurance fraud, rather than simply that three individual sales assistants were doing so.

Ofcom noted ScS's position that the sales assistant simply made a throwaway remark about insurance as part of his sales banter, in response to a flippant suggestion, as he tried to close a deal. It also noted Channel 4's position that he was seriously suggesting that the potential purchaser should consider the merits of committing insurance fraud when deciding whether to make the purchase.

In Ofcom's view the essence of what the sales assistant told Ms Portas was accurate, since the ScS policy provided cover for accidental damage, which is what Ms Portas described in her example of her son being "*negligent*" and behaving like "*a bit of a twit*". Ofcom considered that, although the sales assistant's comment that "*I never told you that though*" might have suggested that what he was saying was in some way wrong, in fact Ms Portas described accidental damage and the sales assistant said that all the person would have to say in that situation was that it was an accident. In Ofcom's view, therefore, what the sales assistant said did not amount to suggesting that Ms Portas should consider lying in order to make a successful claim in the scenario she suggested. In contrast to this, Ofcom noted that the assistants in the other shops each appeared to suggest that a claimant should lie about what had happened.

In Ofcom's view, given that the brief footage was juxtaposed between two examples of assistants in other shops suggesting lying and given Ms Portas' interpretation of the three examples, the effect of the inclusion of the footage from the ScS store was to suggest that the company encouraged insurance fraud. Ofcom considered that this was not a reasonable or justified interpretation in the case of the ScS example.

Ofcom therefore found that ScS was portrayed unfairly in relation to the portrayal of the secretly filmed footage of Ms Portas' conversation with the sales assistant.

- b) Ofcom next considered the complaint that ScS was not given an appropriate and timely opportunity to respond to this allegation. Despite the fact that the footage had been filmed 10 weeks earlier, the programme makers wrote to ScS on 20 January 2011 asking for a comment within 24 hours.

In considering this part of the complaint Ofcom took account of Practice 7.11 of the Code, 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.

Ofcom noted Channel 4's position that the programme did not allege that ScS as a company encouraged insurance fraud, but that it showed that a sales assistant working for the company did so. As set out under decision head a) above, Ofcom took the view that the effect of the inclusion of the footage from the ScS store was to suggest that the company encouraged insurance fraud. It also noted Ms Portas' comment in the programme that "*They are encouraging customers to commit a criminal act*". In Ofcom's view this comment was directed at ScS as well as the two other retailers and was a serious allegation. In these circumstances, ScS was entitled to an appropriate and timely opportunity to respond to the allegation.

Ofcom noted that the programme makers wrote to ScS on 20 January 2011, setting out in some detail a number of statements about the secretly filmed

footage and allegations that may be included in the programme. The letter said that if ScS wished to respond to any of the matters referred to in the letter the programme makers would be happy to hear from the company. The letter also said that any response was required by close of business the following day.

In Ofcom's view the information provided in the letter to ScS of 20 January 2011 was detailed and would have given the company a very clear idea of the allegations that might be included in the programme and the reasons for those allegations. Ofcom considered that the time given for a response was very short, taking into account that this was a documentary rather than, for example, a news programme. Ofcom also noted that, as set out under the decision at head c) below, the programme makers thought they had written to ScS in July or August 2010 and therefore thought that ScS had been aware at least that filming had taken place.

Taking these factors into account, Ofcom took the view that, although detailed information was provided to ScS about the allegation, the timescale had the potential to cause unfairness to ScS.

However, Ofcom also noted that ScS was able to provide a response and that the company's position was set out in the following extract from the programme's commentary:

"I told the sofa giants what I thought of their customer service. ScS and Furniture Village both denied their staff would have encouraged fraud. ScS say they do not believe our filming shows that they fail to listen to the customer".

Ofcom noted that ScS was given only short period of time to respond to the allegation about insurance fraud. However, Ofcom took the view that no unfairness arose to ScS from this, as ScS's denial that its staff would encourage insurance fraud was included in the programme.

Ofcom, therefore, found no unfairness to ScS in this respect.

- c) Ofcom next considered the complaint that Ms Portas stated during the programme that she had spoken to six furniture retailers about featuring in the programme, but that only CSL *"had the balls"* to participate. This gave the impression that ScS had been invited to take part but had refused, so that there had been no alternative but to film secretly in ScS stores. Ms Portas had not in fact approached ScS and the first the company had heard about the programme was when the programme makers wrote to them on 20 January 2011.

In considering this part of the complaint, Ofcom had regard to Practice 7.9 of the Code, as set out under decision head a) above.

Ofcom noted that Channel 4 and the programme makers could not confirm that contact was made with ScS in July or August 2010, although that had been the programme makers' intention, and ScS stated that they had not received any communication from the programme makers until 20 January 2011.

Ofcom noted that footage of the outside of one of ScS's stores was shown approximately two minutes into the programme, when Ms Portas said:

“Just look at these. I mean, actually I feel like I’m going to prison. This is me buying furniture for my home. How gloomy, just even starting from outside. ScS has 97 stores across the UK. For the amount I could spend, I expect good service”.

Footage was then included of her talking to a sales assistant about which might be a suitable sofa for her circumstances and discussing a possible discount. Ms Portas concluded this section in ScS by saying:

“That’s classic hard sell, accompanied by poor advice”.

She then went to a CSL store and a Harveys store, in each of which she also experienced poor customer service. Footage of the three conversations in which Ms Portas felt she had been encouraged to commit insurance fraud was then included. Following this, Ms Portas said:

“Some of the big players need to overhaul their customer service. I know how to do it but only one company has the balls to let me in”.

At the beginning of the second part of the programme, Ms Portas said:

“Of six leading sofa superstores I approached, fast growing northern chain CSL has taken up the challenge to transform customer service and shake up the whole industry”.

Ofcom noted Channel 4’s position that this was in a separate part of the programme from the reference to only CSL having *“the balls”* to participate and that, as five rather than six sofa retailers were visually represented in the programme, viewers would have been aware that the list of possible companies approached by Ms Portas could be greater than the list of companies represented in the programme.

However in Ofcom’s view, it was highly likely, given the inclusion of extensive footage of Ms Portas’ experience at the ScS store, viewers would have concluded that ScS was one of the retailers approached and that it was one of the companies that did not have *“the balls”* to participate in the programme.

In these circumstances, Ofcom considered that viewers were likely to have formed the impression that ScS was one of the companies that did not have *“the balls”* to participate and that, given that there was no evidence that ScS had been offered such an opportunity, this was unfair.

Ofcom therefore found unfairness to ScS in this respect.

Unwarranted infringement of privacy

In Ofcom’s view, the individual’s right to privacy has to be balanced against the competing rights of the broadcasters 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 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.

- d) Ofcom considered the complaint that ScS's privacy was unwarrantably infringed in the making of the programme in that the programme makers filmed secretly in ScS stores and made no effort to contact the company about participation in the programme.

In considering this head of complaint, Ofcom took into account Practices 8.4, 8.5 and 8.13 of the Code. Practice 8.4 states that broadcasters should ensure that words, images or actions filmed or recorded in, or broadcast from, a public place, are not so private that prior consent is required before broadcast from the individual or organisation concerned, unless broadcasting without their consent it warranted. Practice 8.5 says that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted. Practice 8.13 states that surreptitious filming or recording should only be used where it is warranted.

In considering whether ScS's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered whether ScS had a legitimate expectation of privacy in relation to being filmed.

Ofcom noted Channel 4's position that it could see no basis for the suggestion that private corporations ought to have rights to privacy. However Ofcom takes the view that there are situations in which a company does enjoy rights to privacy and considers that the use of surreptitious filming on a company's premises has the potential to intrude on such rights.

In this case, Ofcom considered that the location of the filming, namely a sofa shop to which members of the public had access, was a factor that would have diminished the company's expectation of privacy. However, Ofcom also noted that Ms Portas and the programme makers visited the ScS store undercover and secretly filmed footage of staff and management going about their business. In the circumstances, Ofcom considered that ScS had a legitimate expectation of privacy in the circumstances in which the footage was filmed.

Having found that ScS had a legitimate expectation of privacy in relation to the surreptitious filming, Ofcom then went on to consider whether any potential infringement of privacy was warranted and to weigh the broadcaster's competing right to freedom of expression and the audience's right to receive information and ideas without unnecessary interference. Ofcom noted that the filming took place after visits to ScS stores in Rotherham and Leeds, during which the researcher encountered a number of examples of poor customer service. She was given what appeared to be poor advice on the type of sofa that would be suitable for her purposes and incorrect information about insurance cover, the terms of delivery and prices. There was prima facie evidence of a story in the public interest and reasonable grounds to suspect that further material evidence could be obtained and it was necessary to the credibility and authenticity of the programme. Ofcom noted that the programme makers then followed Channel 4's internal procedures for obtaining approval for surreptitious filming. In the circumstances of this particular case, Ofcom considered that the right to freedom of expression and the public interest in the programme's examination of the poor level of customer service given by some sofa retailers, including ScS, outweighed ScS's expectation of to privacy.

As regards the point made by ScS that the programme did not contact the company about participation in the programme, Ofcom took the view that this was dealt with in its decision at head c) above.

Ofcom, therefore, found no unwarranted infringement of ScS's privacy in the making of the programme.

- e) Ofcom considered the complaint that Mr Heffernan's privacy was unwarrantably infringed in the programme as broadcast in that, despite the fact that the programme's aim was to target Britain's retail bosses, footage of Mr Heffernan, one of the company's managers, was included in the programme, in which his face was visible in its entirety.

Ofcom took into consideration Practice 8.6 of the Code, which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. It also considered Practice 8.14 of the Code which states that material gained by surreptitious filming and recording should only be broadcast when it is warranted.

Ofcom first noted the relevant part of the programme, in which, after the sales assistant said he would get his boss to work out some figures and after Ms Portas said that the manager came to close the deal, the following conversation between Ms Portas and Mr Heffernan was included:

Mr Heffernan: *"If you want to do it now and leave me a deposit, I'll do it all in for £895".*

Ms Portas: *"How much?"*

Mr Heffernan: *"895".*

Ms Portas: *"If I come in tomorrow, can we sort it out? Or does it have to be now?"*

Mr Heffernan: *"Well, that would be for tonight, 'cause it's been a quiet night".*

Ms Portas: *"That's classic hard sell, accompanied by poor advice".*

In considering whether Mr Heffernan's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered whether or not Mr Heffernan had a legitimate expectation of privacy.

Ofcom noted that Mr Heffernan's face was shown unobscured in the programme and his voice was heard. Ofcom considered that Mr Heffernan was identifiable from this footage included in the programme.

Ofcom also noted that the footage of Mr Heffernan showed him discussing a transaction with a potential customer. Ofcom noted that this conversation was conducted on the shop floor and could have been overheard by other people present in the store. Ofcom also took the view that the conversation between Mr Heffernan and Ms Portas, in which Mr Heffernan tried to close the deal set up by the sales assistant, was not private in nature, as no personal financial or similar

matters were discussed. However, Mr Heffernan would not have expected that his business dealings with a customer would be surreptitiously filmed. Ofcom concluded that, notwithstanding that the conversation was conducted on the shop floor, Mr Heffernan had some expectation that identifiable footage of him going about his work would not be included in the broadcast of a television programme.

Having found that Mr Heffernan had a legitimate expectation of privacy in relation to the broadcast of surreptitiously filmed footage of him, Ofcom then went on to consider whether any potential infringement of privacy was warranted and to weigh the broadcaster's competing right to freedom of expression and the audience's right to receive information and ideas without unnecessary interference. In the circumstances of this particular case and for the reasons set out under decision head d) above, Ofcom considered that the broadcaster's right to freedom of expression and the public interest in the programme's examination of the level of customer service given by some sofa retailers outweighed the company's right to privacy. Having found that the secret filming was justified, Ofcom then considered whether the broadcast of that secretly filmed footage of Mr Heffernan, without his identity being obscured, was also justified. Ofcom considered the method Mr Heffernan had used to try to broker a deal, which was illustrative of one of the concerns Ms Portas and members of the public interviewed about their experiences with sofa retailers for the programme had expressed. Ofcom also took into account Mr Heffernan's role and responsibilities as the manager of the store and noted that the identities of other managers who were included in the programme were also not obscured. In these circumstances Ofcom took the view that the public interest outweighed Mr Heffernan's limited expectation of privacy in relation to the unobscured footage of him which was broadcast.

Taking all of these factors into account, Ofcom therefore found that there was no unwarranted infringement of Mr Heffernan's privacy in the broadcast of the programme.

Accordingly, Ofcom has upheld part of ScS's complaint of unfair treatment. It has not upheld the complaint from ScS of unwarranted infringement of privacy in the making of the programme or the complaint from Mr Heffernan of unwarranted infringement of privacy in the programme as broadcast.

Not Upheld

Complaint by Mr Jeremy Bamber

*Killing Mum and Dad: The Jeremy Bamber Story, Sky Three,
14 September 2010*

Summary: Ofcom has not upheld Mr Bamber's complaint of unfair treatment and unwarranted infringement of privacy in the making and broadcast of the programme.

The programme profiled Mr Bamber who was convicted in 1986 of the murder of his mother and father, his sister and her two young sons. It examined the police investigation and included a number of contributors who had been involved in some way with the case or the Bamber family. One of the principal contributors was Ms Kerry Daynes described in the programme as a "*Consultant Forensic Psychologist*". Throughout the programme, Ms Daynes commented on Mr Bamber's character and gave her opinion that his behaviour displayed "psychopathic" traits. The programme also included interview footage with Ms Barbara Wilson, the secretary of Mr Bamber's father, who said that she had witnessed Mr Jeremy Bamber with "*other men*" and "*putting his arm around them and kissing them*".

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

Ofcom found the following:

- Ms Daynes' contribution to the programme was clearly presented as her professional opinion of Mr Bamber and the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts in a way that resulted in unfairness to him.
- Although Mr Bamber had a legitimate expectation of privacy in the circumstances, Ofcom concluded that the broadcaster's right to freedom of expression and the genuine public interest in examining the evidence against Mr Bamber and the possible motivation for the murders outweighed the intrusion into his privacy. Therefore, there was no unwarranted infringement of Mr Bamber's privacy in either the making or the broadcast of the programme.

Introduction

On 14 September 2010, British Sky Broadcasting Limited ("BSkyB") broadcast on its channel Sky Three an edition of a series of programmes entitled *Killing Mum and Dad* which profiled murderers convicted for killing their parents. This particular edition profiled Mr Jeremy Bamber who was convicted in 1986 for the murder of his mother and father, his sister and her two young sons. Mr Bamber is currently serving a life sentence with a whole-life tariff.

The programme began by showing a text caption stating that "*Jeremy Bamber was found guilty at a trial in 1986. This programme is based on evidence from that trial, including photographs used in the proceedings*". It then examined the police investigation into the murders and profiled Mr Bamber's life leading up to the murders, his arrest and his conviction for the crimes. In doing so, the programme featured archive footage and still photographs of Mr Bamber.

A number of contributors were interviewed in the programme. One contributor was former police officer, Mr Christopher Bews, who explained in the early part of the programme the circumstances in which the police had been called to the home of Mr Bamber's parents and found them murdered.

Another contributor to the programme was Mr David Boutflour, Mr Bamber's cousin, who was shown being interviewed and describing a period in Mr Bamber's life when he was living *"quite a high life. He was going up to Stringfellows in London, and clubbing it, and having a little bit of a whale of a time. He was living way beyond his agricultural wages that's for sure."* He later described Mr Bamber's reaction to his parents having bought a flat in London for his sister to help her recover from a mental breakdown. Mr Boutflour also described how he and other relatives had found a *"silencer"* in the house of Mr Bamber's parents.

The programme also included other contributors talking about aspects of the lifestyles of Mr Bamber and his sister, which were said to have caused concern to their parents, and had caused Mr Bamber's mother to become increasingly religious. The programme's commentary explained that Mr Bamber started to do farm work on his parents' farm in *"full new romantic clubbing gear"*. The programme then featured the former secretary of Mr Bamber's father, Ms Barbara Wilson, saying (over reconstructed footage of a person dressed in 'new romantic' costume driving a tractor) that: *"I did see him at odd times dressed in various apparel and also make-up. I think this was to shock people and it was done to annoy Mr and Mrs Bamber, which it did"*.

The commentary then explained that Mr Bamber had started a relationship with a local woman, called Ms Julie Mugford. It included an extract from an interview with Mr Mike Fielder, a former crime reporter for 'The Sun' newspaper, who described Mr Bamber as a *"sexual predator"* and interview footage of Ms Wilson recalling that she had seen him with *"...other fellas"* and that *"he would put his arm round and kiss them and really go to town to impress you."*

Another contributor to the programme was Ms Kerry Daynes who was introduced by the programme as a *"Consultant Forensic Psychologist"* with expertise in *"what early events can put a child on the road to becoming a murderer"*. At various intervals throughout the programme, Ms Daynes commented on Mr Bamber's character and conduct and gave her opinion that his behaviour displayed psychopathic traits.

The final stages of the programme addressed the trial and conviction of Mr Bamber, after which the judge was said to have commented that Mr Bamber was *"evil beyond belief"*. The programme concluded by explaining that, after the trial, the then Home Secretary extended Mr Bamber's sentence to the maximum possible, i.e. life without parole.

Following the broadcast of the programme, Mr Bamber complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed both in the making and the programme as broadcast.

The Complaint

Mr Bamber's case

Unfair treatment

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

- a) The contribution by Ms Danes unfairly and inaccurately portrayed him as a psychopath when (according to Mr Bamber) she had never met him or read any of the numerous psychological reports in his possession which stated that he was not a psychopath.

Mr Bamber complained that Ms Danes presented her opinion that he showed *"all the signs of a psychopath"*, and thereby misled the audience into thinking that she had carried out a psychological assessment of him. (She failed to state at any point that she had not in fact carried out such an assessment or read any professional psychologists' reports on Mr Bamber.)

By way of background, Mr Bamber explained that he has been subject to assessments by 27 expert psychologists (most recently in 2009), none of which concluded that he showed *"any traits consistent with psychopathy"*.

On that basis, Mr Bamber maintained that he was treated unfairly in the programme by not carrying out the research consistent with accurate programming.

Privacy

In summary, Mr Bamber also complained that his privacy was unwarrantably infringed in the making of the programme in that:

- b) The programme makers had obtained personal information about Mr Bamber's sexual orientation by asking intimate questions of people who knew or know him.

Mr Bamber maintained that his sexual orientation was not a feature of the court case against him, that it should have played no part in the programme, and that he was entitled to have his sexual orientation kept private. (It was implicit in Mr Bamber's complaint that he did not give his consent to the obtaining of information about his sexual orientation.)

Mr Bamber further complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- c) The programme and its contributors discussed at length, and ridiculed, intimate details about his sexual orientation which had no relevance to the offence of which he was convicted.

Mr Bamber complained that the issue of whether he was a transsexual, a cross-dresser, gay or straight should have played no part in the programme. It was never part of the criminal case against him and he is entitled to have his sexual orientation kept private.

BSkyB's case

Unfair treatment

In summary, BSkyB responded to Mr Bamber's complaint that he was unfairly treated in the programme as broadcast as follow:

- a) In response to Mr Bamber's complaint that Ms Kerry Daynes' contribution in the programme unfairly and inaccurately portrayed him as a psychopath, BSkyB said that Ms Kerry Daynes was a leading forensic psychologist and author who had made various programmes on the subject of criminal activity. BSkyB said that she was introduced in the programme as a "*Consultant Forensic Psychologist*" and that her contribution pertained to a discussion of general 'psychopathic' types and behaviour, based on her professional experience and observations of Mr Bamber from evidence used in trial. It said that the programme, at no point, suggested that Ms Daynes had met Mr Bamber. It was therefore clear according to BSkyB that her comments were based on her interpretation of the evidence presented during the trial and from the interviews of the other contributors in the programme. This was also made clear by a visual slide at the start of the programme which stated:

"Jeremy Bamber was found guilty at trial in 1986. This programme is based on evidence from that trial and photographs used in the proceedings."

BSkyB said that it was clear from the programme that Ms Daynes' views were those of a professional forensic psychologist reviewing evidence from the murder trial and interviews with police officers and those acquainted with Mr Bamber at the time. For these reasons, BSkyB believed that the contribution of Mr Daynes was not unfair to Mr Bamber.

Privacy

In summary, BSkyB responded to Mr Bamber's complaint that his privacy was unwarrantably infringed in the making of the programme as follows:

- b) In summary and in response to Mr Bamber's complaint that his privacy was unwarrantably infringed in the making of the programme in that intimate questions pertaining to his sexual orientation were asked of people who knew him, BSkyB said that it did not agree that the issue of Mr Bamber's sexual orientation featured prominently in the programme. The programme contained interview footage with people who knew Mr Bamber which were then used to provide background and context to his case. This included observations about Mr Bamber's dress sense at the time (e.g. wearing "*full new romantic clubbing gear*", "*various apparel and also make up*") and wild behaviour ("*he was rampant around bars and clubs in south east Essex*", kissing "*fellas and really go to town to impress you*"). However, BSkyB said that at no point did the programme draw conclusions as to Mr Bamber's sexual orientation. These observations were made to illustrate Mr Bamber's alleged attention-seeking and grandiose behaviour.

BSkyB said that the extent to which the programme could be deemed to make a direct reference to Mr Bamber's sexual orientation, it stated that he had "*numerous girlfriends*" including Ms Mugford who was featured in the programme as having given evidence against him at the trial. The observations made in the programme concerned behaviour that Mr Bamber exhibited in public and,

therefore, do not constitute personal information. Furthermore, BSkyB said that it disputed that Mr Bamber's sexual orientation was a feature of the programme. For these reasons, BSkyB said that it did not believe that Mr Bamber's privacy was unwarrantably infringed during the making of the programme.

In summary, BSkyB responded to Mr Bamber's complaint that his privacy was unwarrantably infringed in the programme as broadcast as follows:

- c) BSkyB said that for the reasons already given above in head b) above, it did not believe that the programme contained intimate details of Mr Bamber's sexual orientation. Observations of Mr Bamber's behaviour were used to illustrate his attention-seeking and grandiose behaviour which, as explained by Ms Daynes, were psychopathic traits and, therefore, relevant to understanding the background and context to his case BSkyB said that at no point in the programme was it suggested that Mr Bamber was transsexual, gay or a cross dresser. For these reasons, it said that it did not believe that the programme, as broadcast, constituted an infringement of Mr Bamber's 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 unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

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

Unfair treatment

- a) Ofcom considered the complaint that Ms Daynes unfairly and inaccurately portrayed him as a psychopath (according to Mr Bamber) she has never met him or read any of the numerous psychological reports in his possession which state that he is not a psychopath.

Ofcom considered whether the broadcaster's actions were consistent with its obligation to avoid unjust or unfair treatment of individuals or organisations in programmes as set out in Rule 7.1 of the Ofcom Broadcasting Code ("the Code"). In particular, Ofcom had regard to Practice 7.9 of the Code which states that before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that it unfair to an individual or organisation.

Ofcom noted the following commentary and contribution from Ms Daynes that appeared in the programme following a description by Mr Boulton of Mr Bamber's experiences as an adopted child sent to an English public school by his parents:

Commentary: *“Kerry Daynes is a consultant forensic psychologist. She studies what early events can put a child on the road to becoming a murderer”.*

[Caption: *“Kerry Daynes, Consultant Forensic Psychologist”*]

Ms Daynes: *“It’s likely that he felt incredibly rejected on many different fronts and that this caused him to feel that he desperately wanted attention, he wanted to be loved but if he actually attempted to get this he would be rejected again. This causes a terrible conflict for a child and one way of coping with it may be simply to detach. You detach from your emotions so you can’t be hurt and sometimes what happens is the emotional switches in Jeremy’s brain may have been permanently jammed in the off position”.*

Ofcom noted that in the segment of the programme dealing with Mr Bamber’s behaviour described by Ms Wilson (i.e. kissing other men), Ms Daynes stated:

“It’s possible that these are the early signs that in actual fact he has got psychopathic traits. So: breaking rules, constantly breaking rules, in many different ways, also being sexually promiscuous and really needing a high level of stimulation. They’re very prone to boredom.”

A later section of the programme addressed Mr Bamber’s behaviour at the funeral of his parents. Following interview footage with Mr Boutflour in which he described how he had seen Mr Bamber smiling at one point after the service (which Mr Boutflour said prompted his brother-in-law to say *“he did it, didn’t he...”*), Ofcom noted that Ms Daynes gave her opinion that:

“I think that that is classic behaviour of a psychopath. I think that in essence Jeremy painted on his emotions, the emotions that he felt he should portray for that day. And then, when he felt nobody was watching him, or nobody who mattered was watching him, he simply took the mask off and put it to one side.”

In the final section of the programme, the commentary stated Ms Daynes’ belief that Mr Bamber *“could kill his family so coldly because he has a personality disorder”*. At this point Ms Daynes was featured saying:

“He certainly ticks an awful lot of the boxes for a psychopath. Here is somebody who is grandiose. He’s arrogant. He seems to have very little emotion. And what he does is very shallow and rather fake. He manipulates other people, and he’s quite happy to use people to meet his own needs”.

The commentary then explained:

“Psychopaths have very little fear or empathy. They do not understand morality. So killing even their own families is easy for them. Being a psychopath would not make you insane. Bamber is still legally guilty of his crimes. But even after 20 years, Bamber says he is innocent...”.

Ofcom noted that the programme concluded with the commentary that stated *“some people believe that Mr Bamber is appealing not because he is innocent, but because he is bored,”* and featured Ms Daynes saying:

“I believe that in the past, he has coped with overwhelming emotions by simply cutting off from them, and really he’s done the same thing in response to his offences. Denial of his offences is the biggest form of cutting off you can have. In his mind he probably believes that he really didn’t do it.”

Ofcom noted that Ms Daynes had not carried out a personal assessment of Mr Bamber or read his psychological reports or had met him or in her professional capacity as a psychologist. However, it is not Ofcom’s role to establish whether the substance of Ms Daynes’ contribution to the programme was correct or not, but to determine whether, in broadcasting her opinions, the broadcaster took reasonable care not to present, disregard or omit material facts in a way that was unfair to Mr Bamber. In doing so, Ofcom considered the contextual basis for Ms Daynes’ opinion as expressed in the programme and whether the programme’s presentation of her opinion resulted in unfairness.

Ofcom noted that Ms Daynes commented throughout the programme on the behaviour that other contributors claimed to have observed of Mr Bamber at “first-hand” and gave her views as to why she believed that Mr Bamber continued to be in *“denial of his offences”*.

Ofcom took the view that it was clear from the programme’s introduction of Ms Daynes that *“she studies what early events can put a child on the road to becoming a murderer”* that the purpose of her contribution to the programme was to express her expert opinion on the case and the possible motives that drove Mr Bamber to commit murder.

Based upon Ms Daynes’ own professional experience as a consultant forensic psychologist and on her examination of information provided to her by the programme makers (for example, the other interviews included in the programme and the evidence from the trial) Ofcom considered that it was legitimate for the programme to include Ms Daynes’ expert opinion.

In these circumstances, Ofcom went on to consider whether not the presentation of Ms Daynes’ opinion resulted in any unfairness to Mr Bamber. Ofcom again noted the manner in which Ms Daynes was introduced by the programme (see paragraph above) and was shown expressing her expert opinion. Ofcom also noted that Ms Daynes had used phrases such as *“it is likely”, “it is possible”, “I think”, “I believe”, “he probably believes”* and *“he certainly ticks a lot of boxes”* in giving her opinion. Ofcom considered that the language used by Ms Daynes in giving her opinions was couched in terms that would have left viewers in little doubt that her comments constituted her opinion only and were not stated as fact.

In Ofcom’s view, this introduction and the nature and content of her comments would have made it clear to viewers that she was a professional psychologist giving her expert opinion on a given set of factors relating to Mr Bamber and the case. Ofcom considered that her opinion was not presented in such a way that viewers would have been misled into thinking that Ms Daynes had carried out a personal assessment of Mr Bamber.

Taking into account all the factors referred to above, Ofcom considered that the presentation of Ms Daynes’ opinion of Mr Bamber’s possible motivation for the

murders, his character traits and whether he was a psychopath was unlikely to have materially affected viewers' understanding of Mr Bamber in a way that was unfair. It also considered that the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts in a way that resulted in unfairness to Mr Bamber.

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

Privacy

- b) Ofcom considered the complaint that Mr Bamber's privacy was unwarrantably infringed in the making of the programme in that the programme makers had obtained personal information about Mr Bamber's sexual orientation by asking intimate questions of people who knew or know him.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights 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 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 Ofcom's Broadcasting Code ("the Code"), which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted. Ofcom also had regard to Practice 8.5 of the Code which states that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted. It also took into account Practice 8.9 of the Code which states that the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

In considering whether or not Mr Bamber's privacy was unwarrantably infringed in the making of the programme, Ofcom first considered whether Mr Bamber had a legitimate expectation of privacy in respect of information about his sexual orientation. Ofcom noted that, according to Mr Bamber, intimate details relating to his sexual orientation had no relevance to the offence which he has been convicted of and played no part in the court case. Ofcom considered that the nature of an individual's sexual orientation is extremely personal and sensitive and that information pertaining to it attracted an expectation that it would remain private and not be sought after or obtained by programme makers for the purpose of making a television programme. Ofcom therefore considered that Mr Bamber had a legitimate expectation of privacy in respect of information about his sexual orientation.

Given this conclusion, and acknowledging that Mr Bamber's consent had neither been given nor sought by the programme makers in relation to obtaining this information, Ofcom went on to consider whether the infringement of Mr Bamber's privacy was warranted.

With regard to privacy, "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why, in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster

should be able to demonstrate that the public interest outweighs the right to privacy.¹

Ofcom first noted that that the programme included interview footage of Mr Fielder, a former reporter for 'The Sun' newspaper who said of Mr Bamber:

"He was a sexual predator. On his nights off from Julie, he was rampant around the bars and the clubs in south east Essex".

The commentary then suggested that it "wasn't only girls" in whom Mr Bamber was interested, and was followed by further interview footage of Ms Wilson recalling that:

"I did see him with other fellas, and if he saw you looking, then he would put his arm round and kiss them and really go to town to impress you. But it didn't seem genuine to me".

Ofcom also took note of the comments made by Ms Daynes about Mr Bamber's possible psychopathic traits:

"So breaking the rules, constantly, breaking the rules in many different ways, and being sexually promiscuous and really needing a high level of stimulation."

Ofcom considered that from the content of the contribution of Mr Fielder, Mrs Wilson and Ms Daynes, it was clear that during the making of the programme that the programme makers had discussed elements of Mr Bamber's sexual orientation with contributors and had sought their views on it. Ofcom recognised, however, that the focus of the interviews in which Mr Bamber's sexual orientation may have been raised had intended to draw out as background possible traits in Mr Bamber's personality that may have been motivated him and how his behaviour was perceived by other people, not to explore Mr Bamber's sexual orientation as the focus of the programme.

Ofcom recognised that Mr Bamber's case was high-profile and had generated significant interest not only at the time of his trial and conviction in 1986, but also in successive years as his case and sentence have been the subject to a number of appeals and case reviews. Also, Ofcom took the view that the nature of the offences for which Mr Bamber was convicted was such that his case would retain public notoriety. Given these factors, Ofcom considered that there was a genuine public interest in the programme's examination of the evidence presented against Mr Bamber at his trial and aspects of his life that the programme suggested may have been relevant to understanding the motivation for the crimes. Ofcom considered that it was legitimate for the programme to explore these issues and to interview and discuss aspects of his character with those who had known him or who were able to give their professional opinion. Ofcom also took into account that the contributors in the programme themselves have the right to impart their personal recollections of Mr Bamber and to give their first hand testimony to the programme makers when being interviewed for the programme without undue constraint. In these circumstances, Ofcom considered that the obtaining of the

¹ Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

material had been proportionate and was particular to the subject matter of the programme.

On balance and given all the factors referred to above, Ofcom concluded that the broadcaster's right to freedom of expression and to receive information and ideas without interference, in the circumstances of this particular case, outweighed the intrusion into the privacy that Mr Bamber would have expected.

Ofcom therefore found that there was no unwarranted infringement of Mr Bamber's privacy in the making of the programme.

- c) Finally, Ofcom considered the complaint that Mr Bamber's privacy was unwarrantably infringed in the programme as broadcast in that intimate details about his sexual orientation were discussed by the programme and its contributors. In considering this head of complaint, Ofcom had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Ofcom first considered the extent to which Mr Bamber could have legitimately expected that details about his sexual orientation would not be discussed and disclosed to a wider audience without his consent. Again, as already considered in head b) of the Decision above, Ofcom considered that the nature of an individual's sexual orientation is extremely personal and sensitive. Such information, in Ofcom's view, attracted an expectation that it would remain private and that it would not be broadcast to a wider audience in a television programme.

Taking these factors above into account, Ofcom concluded that Mr Bamber had a legitimate expectation of privacy in relation to personal information about his sexual orientation being broadcast in the programme.

Given this conclusion, and acknowledging that Mr Bamber's consent had neither been given nor sought by the programme makers in relation to the disclosure of this information in the programme, Ofcom went on to consider whether the infringement of Mr Bamber's privacy was warranted.

Ofcom noted again the segment of the programme that included extracts of interview footage of Mr Fielder, Mrs Wilson and Ms Daynes (set out in head b) of the Decision above) which discussed elements of Mr Bamber's sexual orientation with contributors and presented their views on it. Ofcom took into account that the behaviour displayed by Mr Bamber and discussed by the contributors related to behaviour that had apparently taken place in public. Ofcom recognised that the focus of the interviews in which Mr Bamber's sexual orientation may have been raised had intended to draw out as background possible traits in Mr Bamber's personality that may have been motivated him and how his behaviour was perceived by other people, not to explore Mr Bamber's sexual orientation as the focus of the programme.

Ofcom again recognised that Mr Bamber's case was high-profile and had generated significant interest not only at the time of his trial and conviction in 1986, but also in successive years as his case and sentence have been the subject to a number of appeals and case reviews. Also, Ofcom took the view that the nature of the offences for which Mr Bamber was convicted was such that his case would retain public notoriety. Given these factors, Ofcom considered that there was a genuine public interest in the programme's examination of the

evidence presented against Mr Bamber at his trial and aspects of his life that the programme suggested may have been relevant to understanding the motivation for the crimes. Ofcom considered that it was legitimate for the programme to explore these issues and to include interview footage of contributors who, through their first hand testimony, recounted their recollections of Mr Bamber's behaviour and gave their professional opinions of Mr Bamber's personality traits based upon those testimonies (and evidence from the trial). Ofcom also noted that the programme as broadcast reached no conclusion as to, nor focused on, Mr Bamber's sexual orientation. It merely recounted factual and background information which might assist viewers understanding of Mr Bamber's character generally and the motivation for the crimes.

On balance and given all the factors referred to above, Ofcom concluded that the broadcaster's right to freedom of expression and to impart information and ideas and the audiences' right to receive the same, without interference, in the circumstances of this particular case, outweighed the intrusion into the privacy that Mr Bamber would have expected.

Ofcom therefore found that the infringement of Mr Bamber's privacy in the programme as broadcast was warranted.

Accordingly, Ofcom has not upheld Mr Bamber's complaint of unjust or unfair treatment and unwarranted infringement of privacy in the making and broadcast of the programme.

Other programmes Not in Breach

Up to 5 September

Programme	Broadcaster	Transmission Date	Categories
The Wright Stuff Extra with Gabby Logan	Channel 5	22/07/2011	Sexual material
Tafheem Al Masyal	Takbeer TV	Various	Religious/Beliefs discrimination/offence
Live at the Apollo	Comedy Central	01/08/2011	Generally accepted standards
The Wright Stuff	Channel 5	14/04/2011	Generally accepted standards

Complaints Assessed, not Investigated

Between 23 August and 5 September 2011

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
118 118 sponsorship credits	ITV1	n/a	Crime	1
118 118's sponsorship of The Simpsons	Channel 4	18/08/2011	Disability discrimination/offence	1
9/11: The Day that Changed the World	ITV1	01/09/2011	Generally accepted standards	1
9/11: The Day that Changed the World	ITV1	01/09/2011	Generally accepted standards	1
Afternoon Play: Black Roses - The Killing of Sophie Lancaster	BBC Radio 4	24/08/2011	Generally accepted standards	1
Athletics	Channel 4	30/08/2011	Scheduling	1
BBC News	BBC News Channel	18/07/2011	Race discrimination/offence	1
BBC News	BBC News Channel	09/08/2011	Generally accepted standards	1
BBC News	BBC News Channel	09/08/2011	Generally accepted standards	1
BBC News	BBC 1	28/08/2011	Violence and dangerous behaviour	3
BBC News at One	BBC 1	30/08/2011	Violence and dangerous behaviour	1
BBC News at Six	BBC 1	25/08/2011	Generally accepted standards	1
BBC Proms 2011: The Comedy Prom	BBC2	27/08/2011	Generally accepted standards	3
Big Brother	Channel 5	01/09/2011	Generally accepted standards	1
Brainiac: Science Abuse	Pick TV	22/08/2011	Nudity	1
Broadcasting House	BBC Radio 4	21/08/2011	Offensive language	1
Cambridge Guided Busway's sponsorship of Traffic News	Heart 103FM Cambridge	08/08/2011	Materially misleading	1
Castle	Channel 5	05/08/2011	Television Access Services	1
Celebrity Big Brother	Channel 5	18/08/2011	Materially misleading	1
Celebrity Big Brother	Channel 5	19/08/2011	Competitions	1
Celebrity Big Brother	Channel 5	23/08/2011	Product placement	1
Celebrity Big Brother	Channel 5	25/08/2011	Generally accepted standards	84
Celebrity Big Brother	Channel 5	28/08/2011	Generally accepted standards	1
Celebrity Big Brother	Channel 5	01/09/2011	Generally accepted standards	1
Celebrity Big Brother	Channel 5	01/09/2011	Generally accepted standards	1
Celebrity Big Brother	Channel 5	01/09/2011	Generally accepted	1

			standards	
Celebrity Big Brother	Channel 5	01/09/2011	Generally accepted standards	1
Celebrity Big Brother	Channel 5	02/09/2011	Generally accepted standards	1
Celebrity Big Brother's Bit on the Side	Channel 5	29/08/2011	Generally accepted standards	1
Celebrity Big Brother's Bit on the Side (trailer)	5*	27/08/2011	Sexual material	2
Celebrity Big Brother's Bit on the Side (trailer)	Channel 5	31/08/2011	Sexual material	1
Channel 4 Pigeon ident	Channel 4	n/a	Animal welfare	1
Children in TV	TV	n/a	Under 18s in programmes	1
Christian O'Connell Breakfast Show	Absolute Radio	31/08/2011	Generally accepted standards	1
Comic Book Heroes Season trailer	Sky 1	22/08/2011	Generally accepted standards	1
Continuity announcement	ITV1	02/09/2011	Generally accepted standards	1
Coronation Street	ITV1	26/08/2011	Generally accepted standards	3
Coronation Street	ITV1	29/08/2011	Under 18s in programmes	1
Coronation Street	UTV	n/a	Sexual material	1
County Show Coverage	Radio Pembrokeshire	16/08/2011	Commercial communications on radio	1
Cricket	Channel 5	various	Materially misleading	17
CSI: Crime Scene Investigation	5 USA	02/09/2011	Offensive language	1
Daybreak	ITV1	02/09/2011	Due impartiality/bias	1
Deadly Art	BBC 2	30/08/2011	Harm	1
Dickinson's Real Deal	ITV1	26/08/2011	Competitions	1
Dispatches	Channel 4	11/07/2011	Due impartiality/bias	1
Doctor Who	BBC 3	02/09/2011	Sexual material	1
Drivetime with Carlos	Smooth Radio	24/08/2011	Crime	1
EastEnders	BBC 1	26/08/2011	Generally accepted standards	1
Eden Lake	ITV4	16/08/2011	Violence and dangerous behaviour	4
Eden Lake	ITV4	20/08/2011	Violence and dangerous behaviour	1
Edinburgh Comedy Fest Live 2011	BBC 3	01/09/2011	Race discrimination/offence	1
Edinburgh Comedy Fest Live 2011	BBC 3	02/09/2011	Religious/Beliefs discrimination/offence	1
Eggheads	BBC 2	30/08/2011	Generally accepted standards	1
Emmerdale	ITV1	07/06/2011	Suicide and self harm	1
Emmerdale	UTV	16/08/2011	Generally accepted standards	1
Emmerdale	ITV1	24/08/2011	Harm	1
F1: Grand Prix	BBC / Sky	n/a	Outside of remit / other	1

Format	Sunny Govan Community Radio	n/a	Format	1
Four Lions	Channel 4	04/09/2011	Generally accepted standards	5
Friends	E4	23/08/2011	Advertising scheduling	1
Fun House	Challenge TV	01/08/2011	Sponsorship	1
Get Grumpy (trailer)	Comedy Central	02/09/2011	Offensive language	4
Get Grumpy (trailer)	Comedy Central	04/09/2011	Offensive language	1
Grandpa in My Pocket	Cbeebies	16/08/2011	Offensive language	1
Grumpy Guide to Food	BBC2	31/07/2011	Generally accepted standards	1
Harry Potter and the Prisoner of Azkaban	UTV	30/07/2011	Generally accepted standards	1
Have I Got News for You	BBC 1	03/06/2011	Religious/Beliefs discrimination/offence	1
Hollyoaks	E4	26/08/2011	Religious/Beliefs discrimination/offence	1
Hostel: Part II	5*	19/08/2011	Generally accepted standards	1
Hotel Trubble	CBBC	21/08/2011	Sexual orientation discrimination/offence	1
House Hunt in France	ITV1	31/08/2011	Undue prominence	1
How Hip Hop Changed the World	Channel 4	12/08/2011	Due accuracy	1
Impact Wrestling	Challenge TV	28/08/2011	Violence and dangerous behaviour	1
Inside Nature's Giants	Channel 4	30/08/2011	Harm	1
ITV Morning News	ITV1	01/09/2011	Generally accepted standards	1
ITV News and Weather	ITV1	18/08/2011	Due impartiality/bias	1
Jason Anderson	Radio Hartlepool	22/08/2011	Generally accepted standards	1
Jeremy Vine	BBC Radio 2	26/08/2011	Generally accepted standards	1
Let's Do Lunch ... With Gino and Mel	ITV1	26/08/2011	Competitions	1
Let's Do Lunch ... With Gino and Mel	ITV1	26/08/2011	Harm	2
Live Ford Football Special	Sky Sports 2	20/08/2011	Offensive language	1
Lorraine	ITV1	15/08/2011	Materially misleading	2
Lorraine	ITV1	23/08/2011	Offensive language	1
Mantracker	Extreme Sports	29/08/2011	Offensive language	1
Medical Emergency	Really	20/08/2011	Generally accepted standards	1
Minute to Win it	ITV2	01/09/2011	Violence and dangerous behaviour	1
Mount Pleasant (trailer)	Pick TV	15/08/2011	Sexual material	1
My Father Was a Nazi Commandant	BBC 4	16/08/2011	Generally accepted standards	1
My Parents Are Aliens	CITV	24/08/2011	Sexual material	1
n/a	Noor TV and Radio XL	n/a	Outside of remit / other	1
New Tricks	BBC 1	29/08/2011	Product placement	1

News	Real Radio North West	22/07/2011	Due accuracy	1
News	UTV	n/a	Materially misleading	1
Newsnight	BBC 2	12/08/2011	Race discrimination/offence	103
Newsnight	BBC 2	25/08/2011	Generally accepted standards	1
Newsround	BBC 1	02/09/2011	Crime	1
Page Eight	BBC 2	28/08/2011	Race discrimination/offence	1
Penn and Teller: Fool Us	ITV1	28/08/2011	Generally accepted standards	3
Peppa Pig	Channel 5	24/08/2011	Gender discrimination/offence	1
Psychic First	Watchmetv.tv	n/a	Participation TV - Misleadingness	1
Psychic Interactive	Psychic TV	03/09/2011	Participation TV - Harm	1
Rat Race	Channel 4	23/08/2011	Offensive language	1
Red Sonja	Channel 5	14/08/2011	Hypnotic and other techniques	1
Red Sonja	Channel 5	14/08/2011	Hypnotic and other techniques	1
Repeats	n/a	n/a	Outside of remit / other	1
Rise and Shine with VH1	VH1	09/08/2011	Scheduling	1
Rugby League: Challenge Cup Final	BBC 1	27/08/2011	Offensive language	3
Rugby World Cup (trailer)	ITV4	25/08/2011	Generally accepted standards	1
Shooting Stars	BBC 2	22/08/2011	Animal welfare	1
Show Me the Funny	ITV1	22/08/2011	Disability discrimination/offence	3
Silent Library (trailer)	5*	15/08/2011	Animal welfare	1
Sky News at 5 with Andrew Wilson	Sky News	27/08/2011	Violence and dangerous behaviour	2
Sky News at Ten	Sky News	08/08/2011	Crime	1
Spice Britain	BBC 1	28/08/2011	Offensive language	1
Street Summer (trailer)	Channel 4 / E4	n/a	Crime	1
Streetdance	Channel 4	13/08/2011	Offensive language	1
Sunrise	Sky News	25/08/2011	Generally accepted standards	1
Sunrise	Sky News	28/08/2011	Violence and dangerous behaviour	1
The Jeremy Kyle Show	ITV1	23/08/2011	Generally accepted standards	1
The Merits of Ferrets	Channel 4	26/08/2011	Scheduling	1
The Million Pound Drop Live	Channel 4	02/09/2011	Offensive language	1
The Million Pound Drop Live	Channel 4	02/09/2011	Offensive language	1
The Morning Line	Channel 4	20/08/2011	Due impartiality/bias	1
The Official UK Top 40	MTV Hits	21/08/2011	Materially misleading	1
The Perfect Murder	Channel 4	19/08/2011	Due impartiality/bias	1
The Sex Education Show	Channel 4	n/a	Generally accepted	1

			standards	
The Stream	Al Jazeera	05/08/2011	Due impartiality/bias	1
The Week with George Galloway	Talksport	02/09/2011	Race discrimination/offence	1
The World's Strictest Parents	BBC 3	25/08/2011	Animal welfare	1
The X Factor	ITV1	20/08/2011	Materially misleading	1
The X Factor	ITV1	20/08/2011	Generally accepted standards	76
The X Factor	ITV1	20/08/2011	Offensive language	12
The X Factor	ITV1	20/08/2011	Sexual material	1
The X Factor	ITV2	21/08/2011	Generally accepted standards	1
The X Factor	ITV1	27/08/2011	Competitions	1
The X Factor	ITV1	27/08/2011	Offensive language	2
The Xtra Factor	ITV2	21/08/2011	Sexual material	1
This Morning	ITV1	26/08/2011	Disability discrimination/offence	1
This Morning	ITV1	30/08/2011	Generally accepted standards	1
This Morning	ITV1	02/09/2011	Generally accepted standards	2
Tonight	ITV1	01/09/2011	Due accuracy	2
Top Gear	BBC 2	21/08/2011	Generally accepted standards	1
Toyota Aygo sponsors The Simpsons on T4	Channel 4	21/08/2011	Sponsorship	1
Tweenies	CBeebies	26/08/2011	Materially misleading	1
UK Border Force	Pick TV	21/08/2011	Religious/Beliefs discrimination/offence	1
Undercover Boss	Channel 4	28/08/2011	Religious/Beliefs discrimination/offence	1
V Festival 2011	Channel 4	21/08/2011	Generally accepted standards	3
Women Who Kill	Discovery +1	23/08/2011	Violence and dangerous behaviour	1
World News In Full	Press TV	04/08/2011	Generally accepted standards	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 8 and 21 September 2011

Programme	Broadcaster	Transmission Date
Advertising minutage	MTV Hlts	09 August 2011
Advertising minutage	My Channel	01 August 2011 and 08 August 2011
Advertising minutage	Sky LIVINGit	01 August 2011
Advertising minutage	Star Plus	13 August 2011
Advertising minutage	The Africa Channel	11 August 2011
Newsline	BBC 1 Northern Ireland	24 June 2011
Programming	On FM	22 June 2011
Strike Back Project Dawn	Sky1	11 September 2011
Waterloo Road	BBC 1	14 September 2011
Willowbrae's sponsorship of Forth Radio Travel	Forth One	10 August 2011

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/>.