

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

Notice of Revocation

Licence number: TLCS-1483¹
Service name: Praise TV
Licensee: Destiny Broadcasting Network Europe Limited

Destiny Broadcasting Network Europe Limited held a Television Licensable Content Service ("TLCS") licence under the Broadcasting Act 1990 for the television service Praise TV ("the Licensed Service")

The Communications Act 2003 ("the Act"), the Broadcasting Act 1990 ("the 1990 Act") and the Broadcasting Act 1996 require that any person who provides a television service in the UK must be authorised to do so under a licence granted by Ofcom or another appropriate European regulatory authority. Under section 13(1) of the 1990 Act it is a criminal offence to provide a television service without a licence.

Under section 362(2) of the Act, the provider of the service for the purposes of holding a licence is the person with general control over which programmes are comprised in the service.²

Ofcom's "Guidance regarding the licensing position on the 'provider of a service' and the 'sub-letting' of capacity" dated 21 May 2010³ states that:

"5. Under this statutory definition, 'general control' includes control over what programmes are included in the service and what other services and facilities (for example through the inclusion of a link or facility to interactive features) are included in that service – but does not necessarily mean the provider has control of the content of individual programmes.

6. Ofcom considers that a person will normally have general control if that person exercises effective control over the selection of programmes that comprise the service and their organisation into a programme schedule. It is that person who will normally be treated as being the provider of the relevant service and who will need to hold a broadcasting licence authorising its provision."

Condition 29(2)(a) of all TLCS licences provides that Ofcom may revoke the licence by notice served in writing on the Licensee and taking effect from the time of service if Ofcom is satisfied that the Licensee has ceased to provide the Licensed Service and it is appropriate to revoke the licence.

Further, Condition 29(2)(b) of all TLCS licences provides that Ofcom may revoke the Licence by notice served in writing on the Licensee and taking effect from the time of

¹ The version of this Notice of published on 28 August 2012, incorrectly referred to TLCS-1482. The correct licence number is 1483 [Amended 29 August 2012].

² Section 362(2) states that "the person, and the only person, who is to be treated for the purposes of this Part as providing the service is the person with general control over which programmes and other services and facilities are comprised in the service (whether or not he has control of the content of individual programmes or of the broadcasting or distribution of the service)."

³ The full guidance regarding the licensing position of the provider of the service can be found at <http://licensing.ofcom.org.uk/binaries/tv/service-provider.pdf>.

service if Ofcom is satisfied that the Licensee in purporting to comply with any of the Conditions of the Licence had provided information which is false in a material particular or has withheld any material information with the intention of causing Ofcom to be misled.

Decision

In the course of the correspondence with Ofcom, statements made by Destiny Broadcasting Network Europe Limited about the operation of the Licensed Service failed to satisfy Ofcom that the Licensee had general control over which programmes and other services were comprised in the Licensed Service. Ofcom therefore concluded that Destiny Broadcasting Network Europe Limited had ceased to provide the Licensed Service in accordance with section 362(2) of the Act and that, accordingly, it was appropriate to revoke TLCS Licence 1483 under Condition 29(2)(a) of that Licence.

In addition, and in the alternative, Ofcom was satisfied that in the course of correspondence with Ofcom, the Licensee, in purporting to comply with any of the Conditions of the Licence, provided information which was false in a material particular or withheld any material information with the intention of causing Ofcom to be misled. Accordingly it was appropriate to revoke TLCS Licence 1483 under Condition 29(2)(b) of that Licence.

The Licence was revoked on 15 August 2012.

Revocation under Conditions 29(2)(a) and 29(2)(b) of the Licence

Standards cases

In Breach

Good Morning Psychic

Psychic Line, 12 April 2012, 09:00

Psychic World TV

Psychic Line, 18 April 2012, 15:30

Introduction

Psychic Line is a channel offering psychic readings to callers. It is owned and operated by Playboy TV UK Limited (“Playboy TV” or “the Licensee”).

The channel frequently transmits promotions for premium rate telephone services (“PRS”), both voice and text, by which psychic readings can be obtained, and a facility for viewers to pay for these by credit card. Subject to their availability, callers can select to be connected to a psychic off air, or to the presenter in the studio in which case the reading is broadcast live. PRS calls to the service cost £1.53 per minute.

Good Morning Psychic, Psychic Line, 12 April 2012, 09:00

A complainant alerted Ofcom to a discussion between the presenter and psychic Grant Colyer via webcam which contained testimonials regarding the accuracy of his readings. During this discussion, Grant Colyer gave an account of his experience at the auditions for this year’s series of *The X Factor* where he gave readings for fellow contestants.

“I will just tell you a little story about yesterday. I was just sitting up, waiting to go into an audition room and this girl said, ‘Oh what do you do for a living?’ And when I told her what I did, she went, ‘Oh, oh can you tell me something?’... I literally told her a lot of things. I told her her Dad’s name, I told her his date of birth, month, and I said that she’d fallen out with Mom and Dad just before Christmas and she like, ‘Oh my God, that’s mad’.... I did about three others that came through which probably did me a favour ‘cause of one of them was The X Factor production team and she went into the audition room after and said, ‘Oh my god, this guy is absolutely incredible.’”

The complainant was concerned that this appeared to contradict the on-screen message which informed viewers that the content was for entertainment purposes.

Psychic World TV, Psychic Line, 18 April 2012, 15:30

The complainant also referred to advertising broadcast on the service for an off-air reading which contained the following text.

“The intuition she has will amaze you. Her answers are will be FAST and ACCURATE. She will be specific and detailed. Get your pen and paper ready.”

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

Rule 15.5.2: “Advertisements for personalised and live services that rely on belief in astrology, horoscopes, tarot and derivative practices are acceptable only on channels that are licensed for the purpose of the promotion of such services and are appropriately labelled: both the advertisement and the product or service itself must state that the product or service is for entertainment purposes only”.

Rule 15.5.3 “Advertising permitted under rule 15.5 may not:

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

Ofcom asked Playboy TV how the material complied with these rules.

Response

Good Morning Psychic

The Licensee said that all of its psychics are trained to understand the associated regulations but acknowledged that on this occasion, Grant Colyer had inappropriately overstated his experience. It said that he has since apologised and understood that any future incident will result in his immediate dismissal.

Psychic World TV

The Licensee said that this advertisement was provided by a company which operates services worldwide and was originally in Hungarian. Unfortunately, the word “accurate” was not replaced during the translation of the advertisements from Hungarian. The Licensee added that, since being alerted to the issue, it has removed all of the company’s advertisements and re-evaluated its compliance procedures for pre-recorded psychic content.

Decision

Under the Communications Act 2003, Ofcom has a duty to set such standards 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”. This standards objective is reflected in the rules set out in the BCAP Code.

In September 2010 new Ofcom rules came into force with the effect that channels and content predicated on the promotion of PRS services (‘participation television’) became subject to the BCAP Code. At the same time, the revised BCAP Code allowed PRS-based live and personalised psychic services on channels licensed for that purpose (previously the BCAP Code had prohibited such services).

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, advertising content 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.

In both cases, Ofcom first considered whether the advertising had contained claims of accuracy and efficacy (Rule 15.5.3), and then sought to establish whether the service had made clear that it was intended for entertainment purposes only (Rule 15.5.2).

Rule 15.5.3

Good Morning Psychic

Ofcom noted that when recounting the readings he had done the previous day, Grant Colyer said that he had correctly identified a girl's father's name and date of birth, and events that had happened with regard to her relationship with her parents. He also said that the production assistant had described him as "*absolutely incredible*" after doing a reading for her. By referring to these incidents in this manner, Ofcom considered that Mr Colyer was effectively making claims of accuracy and efficacy. The material therefore breached Rule 15.5.3 of the BCAP Code.

Regarding the material broadcast on 12 April 2012, given the length of time Mr Colyer was permitted on air to make claims of accuracy and efficacy without interruption, Ofcom was concerned that there did not appear to be sufficient knowledge of the relevant BCAP Code rules on the part of the presenter or the production team.

Psychic World TV

Ofcom noted this text-based advertising for an off-air psychic reading was broadcast many times throughout the day included the words "accurate", "detailed" and "specific". Ofcom considered these to be claims of accuracy and as such they breached 15.5.3 of the BCAP Code.

Ofcom acknowledged the Licensee's removal of the advertising upon being made aware of the issue but was concerned that it had only explained how the word "accurate" was overlooked during the translation into English. The fact that the words "specific" and "detailed" in addition to "accurate" were used to describe this service on several occasions underlined that the Licensee did not have sufficiently robust measures in place to ensure compliance with Rule 15.5.3.

Rule 15.5.2

Ofcom then considered this advertising against the requirements of Rule 15.5.2. Ofcom accepts that this service is licensed for the promotion of psychic services and the broadcast content is labelled on air as being for entertainment purposes. However, in view of the fact that the material featured claims of efficacy and accuracy in breach of Rule 15.5.3, as set out above, Ofcom judged that these claims contradicted the purpose of the mandatory labelling of this material as being merely entertainment. Therefore, in both cases, Ofcom also found the advertising in breach of Rule 15.5.2.

In December 2011, Ofcom published guidance¹ to broadcasters in respect of psychic television services predicated on PRS. The guidance stated that such material must

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/psychic-tv-guidance.pdf>

not contain explicit and implicit claims made by presenters/psychics or the broadcast of testimonials or endorsing comments. Additionally, it said that broadcasters should not solely rely on an on-screen message stating the material is for entertainment purposes but that this principle should be reflected in the content as a whole. The guidance referred to two findings published in Broadcast Bulletins 180² and 184³ where material was found to be in breach of both Rule 15.5.2 and 15.5.3.

Given the publication of these findings and subsequent guidance, Ofcom was concerned that the Licensee did not undertake sufficient measures to ensure compliance with these rules.

Breaches of these rules are potentially serious because they may result in consumer harm. Should similar compliance issues arise, Ofcom is likely to consider the imposition of statutory sanctions.

Breaches of BCAP Rules 15.5.2 and 15.5.3

² <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb180/obb180.pdf>

³ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb184/obb184.pdf>

Resolved

Calendar News

ITV Yorkshire, 22 May 2012, 06:00

Introduction

Calendar News is ITV Yorkshire's half-hour early evening local news programme. The licence for ITV Yorkshire is held by ITV Broadcasting Limited ("ITV" or "the Licensee").

The edition broadcast on 22 May 2012 ended with a montage of clips illustrating the exceptionally sunny weather being experienced at that time and accompanied by the song, "The Sun Has Got His Hat On".

A viewer alerted Ofcom to the broadcast of offensive racial language in two lines in the second verse of the song:

*"He's been tanning niggers out in Timbuktu,
Now he's coming back to do the same to you".*

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

- | | |
|-----------|---|
| Rule 1.14 | "The most offensive language must not be broadcast before the watershed." |
| Rule 2.3 | "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context.... Such material may include, but is not limited to, offensive language, ... discriminatory treatment or language (for example on the grounds of...race...)." |

Ofcom therefore requested comments from ITV about how the broadcast of this material complied with these rules.

Response

ITV explained that the music was selected for the montage by an editor from the news library on the assumption that the title and words of the song were appropriate to the theme of the montage. It was assumed, because the tune and opening verse are very well known, that the rest of the song was equally innocuous. ITV said that the editor and other newsroom staff were completely unaware that the original version of the song contained the offensive language. Unfortunately, given this mistaken assumption, the whole song was not reviewed before being selected for the montage, nor was the edited item reviewed by the news producer before broadcast. This did not reflect established practice at the regional newsroom, which is that all items must be checked before broadcast.

ITV said that broadcast of the offensive lyric in this context was therefore an unintended mistake. The music was very recognisably of an earlier age, and the use of this language was clearly not intended to cause offence when it was originally

recorded (in 1932) in a very different cultural context. Nevertheless, the use of the term “nigger” in this particular context was clearly inappropriate.

Shortly after the broadcast and the bulletin had come to an end, it was recognised that inappropriate language had been used. Calendar News took swift action to prevent the repetition of the language in a further broadcast, ensuring that the offensive language was dipped on the ITV1+1 service. Also an apology was broadcast on the later news bulletin that day stating, *“Finally Calendar would like to apologise for a piece of music we transmitted at the end of tonight’s six o’clock programme, which contained offensive language. It was transmitted in error.”*

The incident prompted senior management of the newsroom to emphasise to staff that there should be no repetition of this sort of mistake, and this incident will feature in future newsroom compliance training.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that “persons under the age of eighteen are protected” and that “generally accepted standards are applied to the contents of television...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 Sections One and Two of the Code.

Ofcom research on offensive language¹ clearly notes that the word “nigger” is generally considered by audiences to be among the most offensive language. Therefore the use of this word before the watershed without any justification was a clear breach of Rules 1.14 and 2.3.

Ofcom however took into account that: ITV identified the error almost immediately on transmission, took steps to dip the sound during the repeat on ITV1+1, broadcast an apology during the later news bulletin the same day and took various further measures afterwards to ensure there was no recurrence of this problem.

In view of the action taken by the broadcaster, Ofcom therefore considers the matter resolved.

Resolved

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

Fairness and Privacy cases

Upheld

Complaint by Mrs D made on behalf of her daughter (a minor)

Daddy Daycare, Channel 4, 22 February 2012

Summary: Ofcom has upheld this complaint of unwarranted infringement of privacy made by Mrs D on behalf of her daughter (a minor).

Footage of a three year old girl was included in an episode of a documentary series in which a group of fathers went to work with children in nursery school.

Following the broadcast, Mrs D complained that the footage of her daughter was included without her parents' consent.

Ofcom found that:

- The filming of Ms D's daughter in the playground and at the nursery was an unwarranted infringement of her privacy in connection with the obtaining material included in the programme.
- The broadcast of footage of Mrs D's daughter was an unwarranted infringement of her privacy in the programme as broadcast.

Introduction

During February 2012, Channel 4 broadcast a documentary series called *Daddy Daycare*, in which the parenting skills of a group of nine fathers were put to the test by sending them to work with children at three different nurseries. At the end of the programme broadcast on 22 February 2012, a short excerpt of the following week's edition of the programme was shown. This excerpt showed a group of young children assembling at the beginning of the day in their nursery ("the nursery"). One of the children shown was the complainant's daughter, who was three years old at the time of filming.

Following the broadcast of the programme, Mrs D complained that her daughter's privacy was unwarrantably infringed in connection with obtaining material included in the programme and in the programme as broadcast.

Summary of the complaint and broadcaster's response

In summary, Mrs D complained that her daughter's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that:

- a) Footage of her daughter was filmed despite the fact that Mrs D had not signed a consent form and had specifically stated in writing that she did not consent to her daughter being filmed.

By way of background, Mrs D said that when the programme makers were filming at her daughter's nursery, she had been given information about the filming and had been asked to sign a consent form. On arrival at the nursery on the first day of filming, Mrs D and her daughter were filmed, the camera being only about a

metre from Mrs D's face. She had informed the cameraman that she and her daughter were not to be filmed. However, Mrs D said that her daughter continued to be filmed throughout the period when the programme makers were at the nursery. When she complained to the headteacher, she informed Mrs D that she had given the programme makers photographs of the children who were not to be filmed.

In response to the complaint, Channel 4 said that following discussions with the nursery, the programme makers wrote to all the parents in order to discover the level of interest in their children being involved. The headteacher set out more details in a newsletter and sent a consent form to parents, which offered three options: agreeing with the nursery to allow filming and agreeing to their child taking part; agreeing with the nursery to allow filming but not agreeing to their child taking part; and not agreeing to the filming and not allowing their child to take part. In a further letter to parents, the headteacher sought to address various questions that parents had raised and also set out her views as to the potential benefits of the proposed filming. A meeting was arranged for all parents who wished to meet with the senior members of the production team to discuss the proposed filming. Mrs D did not attend this meeting.

Channel 4 said that out of 101 parents, four disagreed with the filming and did not want their children to take part in the programme, and 10 parents consented to their children appearing in the background of shots only. As the overwhelming majority of parents agreed with the filming and consented to their children taking part, and given the public interest in making and broadcasting the series, the programme makers and the nursery decided that filming at the nursery could go ahead.

Channel 4 said that Mrs D had signed the consent form twice, indicating that she did not consent to her daughter taking part in the programme and that she did not agree with the nursery allowing filming on the premises. The headteacher wrote to each of the parents who did not agree with the filming taking place and explained that the nursery had decided to be involved in the programme and to allow filming at the nursery. Mrs D emailed the headteacher, stating again that she did not want her daughter to be filmed and did not agree with the filming at the nursery. Channel 4 said that the programme makers were only made aware of this correspondence after Mrs D's complaint to Ofcom, although they knew from the consent form that Mrs D did not agree with the filming and did not consent to her daughter taking part in the programme. Channel 4 said that the programme makers had not given any categorical assurances to parents that their children would not be filmed at all, as they could not guarantee that some would not be inadvertently caught on camera. However, it said that had been the programme makers' intention not to include children whose parents had not consented in the broadcast programmes and this was made clear to parents.

In a further nursery newsletter, the headteacher said that the programme makers knew which children's parents had not agreed to the filming and would not take any film of them. She said that if any of those children were inadvertently filmed, they would be edited out and that she would view all the footage filmed, to ensure this was the case.

Channel 4 said that a Protocol for Filming ("the protocol") was drawn up and strictly adhered in order to maintain the privacy of the children whose parents had not consented to filming. This stipulated that:

- The names of all children for whom the programme makers did not have consent were clearly listed on all call sheets and distributed to all members of the film crew on the shoot.
- The programme makers were given photographs of the children that should not appear in the programme.
- On arrival at the nursery, those children would have a coloured smiley badge sticker put on their clothing by nursery staff as they were changing into their nursery overalls.
- Staff at the nursery were to be fully briefed to advise and help the crew avoid filming those children, as the staff could easily recognise them.
- The nursery separated the children whose parents had not consented from the children whose parents had consented to them taking part.
- Those children were put in a different area of the nursery, as far away from the filming as possible.
- A senior member of the production team was always on hand should parents wish to talk over any aspect of the filming process or discuss any concerns. This was communicated to parents both verbally and in a nursery newsletter to parents.

As regards Mrs D's complaint that on arrival to the nursery on the first day of filming she and her daughter were filmed, with the camera being only about a metre from her face, Channel 4 said that all parents/guardians and children had to pass through the nursery gate and door when dropping off or picking up their children. The cameras were situated around the inside of the playground, between the gate and the nursery entrance door. The untransmitted footage showed that Mrs D and her daughter were briefly caught on a camera while entering the playground, but that the camera was focused on one of the fathers as he greeted parents and children in the playground, with Mrs D and her daughter appearing only fleetingly in the background. Channel 4 said that the camera was more than six metres from Mrs D.

Channel 4 said that a camera operated by the producer was filming the headteacher talking to children as they arrived at the nursery. She was standing in the doorway to the nursery talking to children and the untransmitted footage showed that the camera was focused on the headteacher and the children in very close shots. The untransmitted footage also showed that Mrs D and her daughter were inadvertently filmed by this camera and on a few occasions appeared in the background of some of the shots, but for only a fraction of a second each time.

Channel 4 said that at no time was a camera intentionally filming Mrs D and that there was no intrusive filming of her or her daughter. None of the camera operators could specifically recall speaking to Mrs D, but they did recall that some parents told them as they arrived on the first day of filming that they did not want to appear on camera or that they had not consented to their children taking part. The camera operators recalled these as brief, polite exchanges whereby they respected the parents' wishes and immediately responded by pointing their camera in another direction.

As regards the complaint that Mrs D's daughter continued to be filmed throughout the period when the programme makers were at the nursery, Channel 4 said that when the children arrived they changed into tabards which were worn over their clothing. On the first day of filming, nursery staff affixed the identifying smiley face sticker ("the sticker") to the front of the tabards of children who were not to be filmed, including Mrs D's daughter, and they were put into a separate area in the

nursery, where they continued with their daily activities. When the children went outside for their morning break, staff moved the stickers to the front of their jackets and when they returned, the sticker was moved back onto the front of the tabards and the children were again separated from the children who were being filmed.

Channel 4 said that the shot in which Mrs D's daughter appeared in the excerpt included in the programme broadcast on 22 February 2012 was filmed on the first morning when the children were returning to the classrooms after the morning break. The untransmitted footage showed that Mrs D's daughter was filmed for four seconds in a line of children walking through the door of the classroom and was then caught on camera in the background and appeared very briefly, for one second. Channel 4 accepted that Mrs D's daughter was filmed at this point without consent and said that both Channel 4 and the programme makers sincerely apologised for this. Channel 4 said that it could be seen from the untransmitted footage that the sticker was not on Mrs D's daughter's tabard, so the camera operator did not identify her at that point as one of the children who were not to be filmed. Channel 4 said that it appeared that the sticker had fallen off as Mrs D's daughter came back into the school after morning break. The untransmitted footage showed that, on the first morning of filming, Mrs D's daughter was only in the room where filming was taking place for a total of 16 seconds and as soon as she was spotted by nursery staff she was taken out of the room. Channel 4 said that the programme makers were therefore confident that as soon as Mrs D's daughter was spotted, the sticker would have been re-applied to her and she would have been placed with the other children who were not being filmed. Channel 4 said that Mrs D's daughter did not continue to be filmed throughout the period of filming and that the programme makers took great care to adhere to the protocol.

Channel 4 accepted that Mrs D's daughter was filmed without her parents' consent, but did not accept that on the first day of filming they were filmed with the camera only one metre from Mrs D's face, nor that her daughter continued to be filmed throughout the period that the production team were filming at the nursery.

Channel 4 said that filming in the playground was undertaken with the informed consent of the nursery and of the individuals whom the cameras were following. Channel 4 acknowledged that Mrs D had not consented to her daughter being filmed, but submitted that the filming in the playground did not amount to an unwarranted infringement of her privacy, as Mrs D knew that there would be cameras at the school that day and the cameras were clearly visible and openly filming when they arrived. Filming was outside in the playground next to the street and was reasonable and proportionate, with the aim being to capture on film the dads' first morning at the school, with decisions about what material would be included in the broadcast programme to be made later on. Mrs D and her daughter were only very briefly caught on film in the background in a semi-public place as they arrived at the school. They were not targeted, approached or asked to speak to camera. Channel 4 argued that Mrs D's daughter did not have a legitimate expectation of privacy in respect of this filming, but said that if she did have such an expectation, the filming and any infringement of Mrs D's daughter's privacy was warranted, given the rights to freedom of expression of the nursery staff, other parents and children, Channel 4 and the programme makers in relation to filming for a programme with a clear public interest.

Channel 4 accepted that Mrs D's daughter had a legitimate expectation of privacy in respect of filming of her inside the nursery and that she was inadvertently filmed contrary to the express wishes of her mother and in spite of the careful measures that had been put in place in order to try to avoid this happening. However, Channel 4 said that, if the filming in the nursery did amount to an unwarranted infringement of her privacy, it was not a serious infringement for a number of reasons:

- she was filmed only briefly and as part of a group walking into a classroom;
- she was not targeted or picked out;
- the camera was a reasonable distance away from her; and
- she did not speak to camera and, on broadcast, she was not named or identified other than her face being shown fleetingly.

Mrs D also complained that her daughter's privacy was unwarrantably infringed in the programme as broadcast in that:

- b) A full face shot of her daughter was included in the excerpt promoting the following week's programme, from which she was clearly identifiable. This was despite the fact Mrs D had specifically informed the programme makers in writing that she did not consent to her daughter being filmed at all.

In response, Channel 4 said that Mrs D's daughter appeared for three seconds in the excerpt promoting the following week's programme. Channel 4 said that protecting the privacy of contributors and, in particular, ensuring that the children whose parents had not consented did not appear in the broadcast programme was of paramount importance to the programme makers. In conjunction with the nursery, the production team put together a folder containing photographs of the children who were not to be included in the programme to be used by the producer and the director during the edit to check that those children were not accidentally included or identifiable in the programme. During the edit, the production team also looked out for any children wearing the sticker. Channel 4 said that during the final stages of the edit, the production manager and the executive producer used the photographs and looked for children wearing the sticker to do a further cross check of the programme. It was also agreed that the headteacher and another member of the nursery staff would view the programme during the editing process with the principal aim of identifying any children whose parents had not consented to their inclusion in the programme who may have been inadvertently filmed and included in the programme, so they could be removed from the programme or blurred so that they would not be identifiable.

Channel 4 accepted that, regrettably, despite the rigorous checks and controls that the programme makers had put in place, a very brief shot of Mrs D's daughter was broadcast in the excerpt. Channel 4 said that, if such filming and broadcast did amount to an unwarranted infringement of Mrs D's daughter's privacy, it was not a serious infringement for the reasons set out under head a) above.

Channel 4 also accepted that Mrs D's daughter was clearly visible in the excerpt, but said that she would not be identifiable to anyone other than those closest to her, particularly as both the production team and nursery staff failed to identify her in this shot in the programme prior to broadcast. Mrs D's daughter was not named and no other personal details about her were revealed. Although she was

in the nursery, she was not doing anything of a particularly private nature, but was fleetingly shown walking into a classroom along with other nursery children.

Channel 4 said that there was a clear public interest in raising awareness of and highlighting the fundamental role that men play in raising children. By recognising the importance of a male role model in children's lives and education from their early years, the series aimed to show that childcare was a tough and very rewarding job, which was equally suitable for men and women. The series was supported by child welfare and childcare organisations including the National Day Nurseries Association, Daycare Trust and the Preschool Learning Alliance.

Channel 4 said it was a matter of some frustration that in spite of all the measures that were put in place the image Mrs D's daughter was missed in the edit and ended up being broadcast. The programme makers had apologised to the family and immediately upon being notified Channel 4 and the programme makers took the matter seriously and took swift and decisive steps to ensure that there would be no further broadcast of an identifiable shot of Mrs D's daughter.

Decision

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

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

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

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 intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- a) Ofcom first considered the complaint that Mrs D's daughter's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that footage of her daughter was filmed despite the fact that Mrs D had not signed a consent form and had specifically stated in writing that she did not consent to her daughter being filmed.

In considering this part of the complaint, Ofcom 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 consent or be otherwise warranted.

In considering whether Mrs D's daughter's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom first considered the extent to which she could have legitimately expected that footage of her would not be filmed.

Ofcom noted that Mrs D's daughter was filmed both on arrival at the nursery on the first day of filming and again during the course of that day. Ofcom noted the programme makers' position that they could not give a categorical assurance that Mrs D's daughter would not be filmed at all, as there was a risk of inadvertent filming, and also noted the extensive steps that were taken prior to the filming to ensure that the children whose parents had not consented to their participation in the programme were not filmed. Mrs D had made it clear that her daughter was not to be filmed and the programme makers and the nursery had put in place numerous measures intended to ensure that she was not filmed and that, in case of inadvertent filming, that any footage would not be included in the programme.

Taking all these factors into account, Ofcom took the view that Mrs D's daughter had a legitimate expectation of privacy in that she would not be filmed.

Having taken into account that Mrs D's daughter had a legitimate expectation of privacy, it was necessary for Ofcom to go 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 Channel 4's submission that there was a distinction between the filming in the playground and the filming within the nursery on the basis that the filming in the playground was in a semi-public place and was reasonable and proportionate. Ofcom acknowledged that there was some distinction between the filming in the playground and the filming within the nursery. However, given Mrs D's clear stipulations to the programme makers and the nursery that she did not wish her daughter to be filmed and given the clear intention on the part of the programme makers not to film her, Ofcom took the view that filming of her both in the playground and later within the nursery was an infringement of her privacy.

Ofcom took the view that, in general terms, there was a legitimate public interest in investigating the role played by men in raising children and the scope for men to take up child care as a career. However, Ofcom did not consider that there was any legitimate public interest in filming footage of Mrs D's three year old daughter in circumstances where parental consent had specifically been refused and where it was the programme makers' clear intention to exclude her from the filming due to the lack of parental consent. In these circumstances, it was not warranted for the footage of Mrs D's daughter to be filmed without consent.

On balance, taking account of all the circumstances of this case, Ofcom concluded that the broadcaster's right to freedom of expression and the audience's right to receive information and ideas without interference, did not outweigh Mrs D's daughter's expectation of privacy. Ofcom found therefore that Mrs D's daughter's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme.

- b) Ofcom then considered the complaint that Mrs D's daughter's privacy was unwarrantably infringed in the programme as broadcast in that a full face shot of her daughter was included in the excerpt footage, from which she was clearly identifiable. This was despite the fact Mrs D had specifically informed the programme makers in writing that she did not consent to her daughter being filmed at all.

In considering Mrs D's complaint that her daughter's privacy was unwarrantably infringed in the programme as broadcast, 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. Ofcom also had regard to Practice 8.20 of the Code, which states that broadcasters should pay particular attention to the privacy of people under sixteen, and Practice 8.21, which states that where a programme features an individual under sixteen or a vulnerable person in a way that infringes privacy, consent must be obtained from: a parent, guardian or other person of eighteen or over in loco parentis; and wherever possible, the individual concerned; unless the subject matter is trivial or uncontroversial and the participation minor, or it is warranted to proceed without consent.

In considering whether Mrs D's daughter's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she could have legitimately expected that footage of her would not be broadcast.

Ofcom considered the complaint in the context of the requirement in the Code that particular attention must be paid to the privacy of people under the age of sixteen years and noted that Mrs D's daughter was three years old at the time of the broadcast of the programme in which footage of her appeared.

Ofcom noted that the programme followed three fathers as they went to work at the nursery. The programme included footage of children in the playground and in the nursery building and, in the excerpt promoting the following week's programme, a group of children was shown lining up to go into a class room. This brief clip included Mrs D's daughter, who was visible for three seconds.

Ofcom also considered the nature of the footage and the context in which it was used in the programme. Ofcom noted that the clip was shown as an excerpt promoting the following week's programme and that it showed Mrs D's daughter lining up with other children to go into a classroom. She was second in the line and was clearly visible. This clip was accompanied by commentary which said: *"...we'll be working in this exclusive Chelsea nursery"*. Ofcom noted that nothing was said to draw particular attention to Mrs D's daughter and that she was not the focus of the programme or the excerpt promoting the next programme.

Ofcom also noted that the footage of Mrs D's daughter that was included in the programme was filmed in a nursery, a place where filming would normally attract a high expectation of privacy.

Ofcom noted that Mrs D had also made it clear on a number of occasions that her daughter was not to be included in the programme and that extensive steps were taken by the programme makers, with the assistance of staff at the nursery, to ensure that footage of her was not included in the programme. In these circumstances, Ofcom took the view that Mrs D's daughter had a legitimate

expectation of privacy in that footage of her filmed at the nursery would not be included in the programme and broadcast.

Having formed the view that Mrs D's daughter had a legitimate expectation of privacy, Ofcom considered whether or not her privacy was unwarrantably infringed as a result of the inclusion of the footage in the programme. In doing so, Ofcom considered the broadcaster's competing right to freedom of expression and the audience's right to receive information and ideas without unnecessary interference.

Ofcom acknowledged that the footage of her that was included in the programme lasted only three seconds and that she was not named or identified. However, Ofcom also took the view that she was clearly visible and identifiable, notwithstanding the fact that the programme makers and nursery staff did not realise during the editing process that she had been inadvertently included. Section 3(4)(h) of the Communications Act 2003 requires Ofcom, in performing its duties, to have regard to the vulnerability of children. Ofcom also considered the requirement in Practice 8.20 for broadcasters to pay particular attention to the privacy of people under sixteen and the requirement in Practice 8.21 for consent from a parent - unless the subject matter is trivial or uncontroversial and the participation minor, or it is warranted to proceed without consent. In Ofcom's view, although the footage was brief, it was a relatively close up shot of a child, whose mother had explicitly refused consent for her inclusion in the programme.

As set out in its decision under head a) above, Ofcom took the view that, in general terms, there was a legitimate public interest in investigating the role played by men in raising children and the scope for men to take up child care as a career. However, Ofcom did not consider that there was any legitimate public interest in broadcasting footage (albeit very brief) of Mrs D's daughter in circumstances where she was only three years old, where parental consent had specifically been refused and where it was clearly the programme makers' intention to exclude her from the programme due to the lack of parental consent. In these circumstances it was not warranted for the footage of Mrs D's daughter to be included without consent.

Ofcom noted the extensive measures taken by both the programme makers and the nursery to try to prevent the broadcast of any material in the programme which might unwarrantably infringe the privacy of Mrs D's daughter. Nonetheless, these measures were not effective in this case and that footage of the child was inadvertently included in the programme. On balance, taking account of all the circumstances, Ofcom concluded that the broadcaster's right to freedom of expression and the audience's right to receive information and ideas without interference, did not outweigh Mrs D's daughter's expectation of privacy. Therefore, Ofcom found that Mrs D's daughter's privacy was unwarrantably infringed in the programme as broadcast.

Accordingly, Ofcom has upheld Mrs D's complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.

Not Upheld

Complaint by Ms E

How Sex Works, BBC Three, 23 January 2012

Summary: Ofcom has not upheld this complaint of unwarranted infringement of privacy made by Ms E.

The programme, which was about sex within long-term relationships, included Mr E (Ms E's ex-husband) talking about his experience of erectile dysfunction.

Ms E complained to Ofcom that her privacy was unwarrantably infringed in the programme as broadcast.

In summary Ofcom found that there was no unwarranted infringement of Ms E's privacy in the programme as broadcast because in the particular circumstances of this case the intrusion into her privacy was warranted by the public interest and further justified by Mr E's right to freedom of expression in matters of direct relevance and importance to him.

Introduction

On 23 January 2012, BBC Three broadcast an episode of *How Sex Works* which formed part of a series of programmes in BBC Three's "Sex Season". This particular episode focused on "how sex and relationships change as we move in to long-term relationships".¹

One of the people featured in the programme was a man called "Alan", who is the ex-husband of the complainant, Ms E. The narrator introduced Alan [i.e. Mr E] as "a 35 year old taxi-driver from Glasgow, who got married in 2004". Alan explained that during the first few years of his marriage he had a "great sex-life", however this changed after his children were born. He said:

"after my kids were born, that's when it went pear-shaped...basically halfway through sex I could just feel myself....my penis just getting softer and softer until such time as it was no use."

Alan then explained how this affected his confidence and the various treatments he had sought to deal with his condition.

Following the broadcast of the programme, Ms E complained to Ofcom that her privacy was unwarrantably infringed in the programme as broadcast.

Summary of the complaint and broadcaster's response

In summary, Ms E complained that her privacy was unwarrantably infringed in the programme as broadcast in that the programme broadcast comments made by her ex-husband, concerning personal details of their sex life, without her consent or knowledge. Ms E added that she is a very private person and was therefore devastated and humiliated that this information was discussed in the programme without her consent.

¹ Description provided on the BBC website.

By way of background Ms E said that she only found out that these personal details were broadcast in the programme from her partner, who in turn was informed by his friends.

In response, the BBC said that one of the issues considered in the programme was how “sex doesn’t necessarily become more straightforward” as one settles into a long-term relationship and that this section of the programme included a discussion about erectile dysfunction featuring Ms E’s ex-husband, Mr E. The broadcaster said that Mr E was identified only as “Alan...a 35 year old taxi-driver from Glasgow, who got married in 2004” and that he described how, after his children were born, he began to experience difficulties while having sex. He described how this made him feel a failure and how he had tried, first, medication, and then a hydraulic pump to address his problem. The broadcaster said that the programme made clear that Mr E and his wife had since parted and that he was still in need of the hydraulic pump in order to successfully have sex. It added that the interview with Mr E was intercut with factual material describing how such difficulties can be caused by insufficient arterial blood flow to the penis, what might cause this, and how various remedies such as Viagra and the pump used by Mr E work in addressing the problem.

The BBC accepted that in many circumstances, Ms E would enjoy a reasonable expectation of privacy in relation to a discussion about her sex life with Mr E. However, it argued that in this case any expectation of privacy she might otherwise enjoy was outweighed by Mr E’s right to express himself freely on matters which deeply affect his own life and that therefore Ms E did not have a reasonable expectation that Mr E should not, without her consent, disclose matters which were personal to him as well as to her. The BBC added that Mr E felt strongly that he wanted to contribute to a public discussion and the dissemination of information on a subject which had affected him profoundly. He believed that his contribution would be valuable to others facing similar difficulties.

In this context the BBC referred to a previous Ofcom complaint which concerned a couple’s post-breakup dealings with the Child Support Agency². The BBC observed that in its decision on this case Ofcom said that it:

...recognised that Ms T was concerned not to have matters relating to her private and family life disclosed in public. However, Ofcom also acknowledged Mr W’s right to freely express himself on matters that have affected his own life and that of his child.

Ofcom also concluded that:

... while the contributions from Mr W, in relation to past payments to Ms T and his dealings with the CSA, were personal to both Ms S and Mr W it was reasonable for him to choose to disclose them. Taking this balance of factors into account, it was Ofcom’s view that while Ms T might have had a general expectation that information which was personal to her would not be disclosed in the public domain without her consent, she did not have a reasonable expectation, in these specific circumstances, that Mr W should not disclose matters of this nature that were personal to him as well as to her.

² Complaint by Ms T on behalf of herself and her son H, Northwest Tonight, BBC1 (Northwest), 30 June 2006.

Given that Ms T's expectation of privacy was not reasonable in the circumstances of this case, Ofcom found that there was no infringement of her privacy.

The BBC argued that the circumstances of the present case are directly comparable to this earlier case and that the issues at stake are the same. In addition, it said that given that it was made clear in the *How Sex Works* programme that no responsibility attached to Ms E for the difficulties which Mr E faced (as evidenced from the fact that he was still, even after the end of his marriage, having to use the pump) the matters disclosed were, if anything, more his property than hers.

By way of background, the BBC explained that it was at Mr E's insistence that his former wife's consent was not sought. He believed strongly that it was his right to disclose personal information relating to himself if he so wished, especially if by doing so he could perform a service to those similarly afflicted.

However, the BBC also said that if Ofcom considers that Ms E had a reasonable expectation of privacy in these circumstances it believed that any infringement of her privacy in the broadcast of this programme was warranted in the public interest.

It said that any infringement of privacy which Ms E may have suffered was considerably mitigated by the way in which Mr E was presented. In particular, by the fact that he was identified only by his first name and the fact that he lived in Glasgow. The BBC said that while this information would have made Ms E identifiable, this would have been only to the relatively small group of people who might have recognised Mr E and known that she had previously been married to him. It added that no details of Mr and Ms E's sex life were given other than that Mr E, at a certain stage, began to experience difficulties for which, it was clear from the narrative, she bore no responsibility.

The BBC also said that any residual infringement of Ms E's privacy would have been amply warranted by the public interest in producing a programme on issues such as this which would have been of considerable comfort and assistance to those suffering from similar difficulties. It said that Mr E's story was not presented gratuitously but was embedded in a contextual discussion of the causes of and possible remedies for difficulties such as those he experienced and that this was shown within a specialist factual series exploring the science behind sex.

Representations on Ofcom's preliminary view

In response to Ofcom's preliminary view in this case (which included the BBC's response to the complaint), Ms E's main points were in summary as follows.

Ms E said that because the section of the programme which included Mr E was filmed in a 'local' pub (and the broadcast included a clear image of the name of the pub) the programme indicated that her ex-husband came from the small town in which this pub was located rather than the much larger area of Glasgow. With regard to the infringement of her privacy, the issue was not whether the general public could identify who she was but that people known to her now know details about her sex life.

Ms E believed that in the preliminary view Ofcom did not give sufficient weight to her right to privacy, compared to the broadcaster's and Mr E's rights to freedom of expression and to the public interest in broadcasting this material given that nobody was at risk of any harm or any health risk and no illegal activities had taken place. She said that the comments made in the programme by her ex-husband concerned

personal details of her sex life in the programme and he could have participated in the programme without discussing their sex life.

In response the BBC disputed Ms E's argument that Mr E's place of residence might be discerned from the fact that he was shown being interviewed in a 'local' pub. It said that there was nothing in the programme to suggest that this pub was his 'local' pub and that given the programme made it clear he was a taxi driver viewers might just as plausibly have inferred that he chose to be interviewed some distance away from his home.

The BBC considered that Ofcom's preliminary view did give sufficient weight to Ms E's right to privacy and to the public interest. The BBC said programmes could serve the public interest by offering advice and information on health matters even where, as here, there might not be a direct risk of harm.

The BBC said the other main points raised by Ms E related to the issue of whether she had a reasonable expectation of privacy given the topics discussed and the personal information disclosed by her former husband in the programme. It noted that in its preliminary view Ofcom had concluded that Ms E did have an expectation of privacy but that this was limited by a number of factors (notably Ms E was not named in the programme, Mr E was not identified by his surname and no details of their sex life were included other than Mr E's statements that he had enjoyed it during the early years of their marriage and that he had subsequently started to suffer from erectile dysfunction). The BBC argued that none of these factors limiting Ms E's expectation of privacy was undermined by the new points raised by Ms E.

Decision

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

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

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript and both parties' written submissions. Ofcom also took account of the representations relevant to the entertained complaint made by both Ms E and the BBC in response to being given the opportunity to comment on Ofcom's preliminary view on this complaint (which was not to uphold it). While Ofcom had regard to all of Ms E's and the BBC's comments in finalising this decision, it concluded that the further points raised by the parties did not materially affect the outcome of this complaint of unwarranted infringement of privacy.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster's to freedom of expression and the audience's right to receive information. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or

restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

Ofcom considered the complaint that Ms E's privacy was unwarrantably infringed in the programme as broadcast in that it included comments made by her ex-husband concerning personal details of their sex life, without her consent or knowledge.

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, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

In order to establish whether or not Ms E's privacy was unwarrantably infringed in this respect, Ofcom first assessed the extent to which she had a legitimate expectation of privacy in respect of the broadcast of this material.

During the relevant section of the programme Ms E's ex-husband discussed the erectile dysfunction from which he started to suffer during his marriage to Ms E.

Ms E neither appeared nor was named in the programme and that her ex-husband was identified by his first name only. Ofcom also noted that several clear images of Mr E's face were included in the programme and that the programme disclosed not only Mr E's first name but also his age, his occupation, the name of the city in which he lived, the year in which he married and that fact that he and his wife were no longer together. Given these observations Ofcom considered that Ms E would have been identifiable as the former wife of Mr E. However, it also considered that this would only have been the case amongst the particular group of people who knew both Ms E and Mr E and that they had previously been married to each other. Ofcom noted the comments each party made about the broadcast in the programme of images of Mr E being interviewed in a 'local' pub – the name of which was shown in the programme. We noted that no indication was made in the programme that this pub was local to Mr E. However, we concluded that, even if some viewers had recognised the location of the pub in question, and inferred that it was located close to where Mr E lived, this would have had little material impact on the degree to which he (and through him Ms E) was identifiable. This was because the programme also included clear images of Mr E's face as well as his first name, his age and occupation and the name of the city in which he lived and worked – and therefore he would have been recognisable to anyone to whom he was already known.

With regard to the nature of the information disclosed, Ofcom noted that no information about Ms E specifically was included in the programme other than the fact that she and her former husband had had two children, and that at some point after the birth of their children he had started to suffer from erectile dysfunction.

In particular, Ofcom noted that Mr E made no adverse reflections upon Ms E in the programme. Rather he made it very clear that he considered that: he had had a "*great sex-life*" during the early years of his marriage; notwithstanding the fact that he had started to suffer from erectile dysfunction sometime after the birth of his children he considered that he had had "*two beautiful children*" with Ms E; and, without the hydraulic pump which he had had fitted to his penis he would still be unable to

maintain an erection and therefore his condition was not caused by or linked to his former relationship with Ms E.

Mr E's descriptions of how he felt about his erectile dysfunction prior to receiving treatment for it also plainly indicated that he regarded the condition from which he suffered to be his problem alone. For example, Mr E was shown saying:

"Psychologically it does knock your confidence very badly, it's a lot of emotions, a lot of feelings inside that: 'I am a man here and I can't perform'...you feel like a failure, totally feel like a failure as if you are not a man basically..."

Lastly, Ofcom observed that the information which Mr E disclosed was presented within the context of an assessment of the incidence and causes of erectile dysfunction in the UK, a description of the physical processes that occur with this condition and the available treatments for men suffering from it.

Ofcom considered that the comments made by Mr E which concerned his sex life during his marriage were personal to Ms E (as well as to her former husband) and that therefore Ms E had a legitimate expectation of privacy regarding the inclusion of these comments in the programme as broadcast. However, we also considered that this expectation of privacy was limited because: Ms E was not named in the programme; Mr E was not identified by his surname (i.e. the name he shared with the complainant); and no details about Mr E's sex life with Ms E were included in the programme, other than the fact that Mr E had enjoyed his sex life during the earlier years of his marriage and that subsequently he started to suffer from erectile dysfunction.

Ofcom noted other factors which Ms E raised in her representations on the preliminary view (notably the nature of her relationship with her former husband, that the programme rendered her identifiable as the ex-wife of Mr E to people to whom she was already known and the fact that Mr E expressly desired the programme makers not to contact Ms E about his participation in the programme). However, these factors did not alter our view that the inclusion of Mr E's comments in the programme as broadcast intruded into Ms E's legitimate expectation of privacy, but that, as noted above, this expectation was limited.

We then went on to consider whether this intrusion was warranted.

In this context "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 privacy³. As with all of our considerations of complaints of unwarranted infringement of privacy, in reaching our a decision on this case we intensely focused on the importance of the rights enshrined in Article 8 of the European Convention on Human Rights ("the ECHR") – the right to respect for private and family life – when balanced against the rights enshrined in Article 10 of the ECHR – the right to freedom of expression, which includes the right to hold opinions and to receive and impart information.

³ 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.

With regard to Practice 8.6, Ofcom observed that Ms E did not give consent for the broadcast of the material in question. We recognised that matters relating to Ms E's sex life with her former husband were personal to her and that she would have preferred not to have had any such matters disclosed in public. We also recognised Mr E's right in accordance with his right to freedom of expression to discuss a matter (i.e. his erectile dysfunction) which was extremely personal to him and which had affected his own life so profoundly. In addition, there was a strong public interest in broadcasting the discussion of this issue (including Mr E's comments regarding his sex life during his former marriage) in that it may be of considerable comfort, assistance and interest to those in the audience suffering from similar difficulties to Mr E, and who had a right under their right to freedom of expression to receive this information.

Ofcom also took into consideration that, given the way in which this section of the programme was presented, viewers would have understood that Mr E disclosed the information that he suffered from erectile dysfunction to help other people who suffered from this condition and that although this condition started during his marriage in no way did he suggest his former wife was responsible for it.

In Ofcom's view the inclusion in the report of Mr E's comments regarding his sex life during his former marriage served the public interest. This was because their inclusion was integral to his first-hand account of his experience of erectile dysfunction the broadcast of which would have helped other people suffering from similar difficulties and informed the public about how such a condition can affect the individuals concerned.

After carefully balancing all the relevant factors, Ofcom considered that in the circumstances of this case Mr E's right to disclose this information outweighed Ms E's limited expectation of privacy in relation to the broadcast of this material. We had regard in particular to the facts that: the information was personal to Mr E as well as to Ms E, in the context of a programme taking a serious look at the condition from which he suffered; the significance of the broadcaster's and Mr E's rights to freedom of expression; and, the audience's right to receive information of this nature in the public interest was important.

We therefore concluded that the intrusion into Ms E's privacy by the inclusion of these comments in the programme in these particular circumstances was warranted, and there was no unwarranted infringement of Ms E's privacy in the programme as broadcast.

Accordingly, Ofcom has not upheld Ms E's complaint of unwarranted infringement of privacy in the programme as broadcast.

Other Programmes Not in Breach

Up to 6 August 2012

Programme	Broadcaster	Transmission Date	Categories
4thought.tv	Channel 4	13/02/2012	Harm
Advertisements	SAB	n/a	Advertising minutage
Britain's Got Talent	ITV1 London	07/05/2012	Premium rate services
Coca-Cola: The Real Story Behind The Real Thing	CNBC	14/01/2012	Promotion of products/services
Saturday Live	BBC Radio 4	19/05/2012	Crime

Complaints Assessed, not Investigated

Between 24 July and 6 August 2012

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's sponsorship of ITV Movies	ITV4	n/a	Generally accepted standards	1
2 Broke Girls	E4	26/07/2012	Materially misleading	1
4Seven promotions	Channel 4	19/07/2012	Materially misleading	1
50 Greatest Magic Tricks	Watch	29/07/2012	Offensive language	1
Adult programming	n/a	n/a	Sexual material	1
Adult programming	Various	n/a	Outside of remit / other	1
Advertisements	Various	n/a	Advertising scheduling	3
American Dad!	BBC 3	26/07/2012	Race discrimination/offence	1
Argumental	Dave	24/07/2012	Religious/Beliefs discrimination/offence	1
Baseball	BBC Radio 5 Live Sports Extra	22/07/2012	Outside of remit / other	1
BBC News	BBC 1	08/12/2011	Outside of remit / other	1
BBC News	BBC 1	28/07/2012	Outside of remit / other	1
BBC News	BBC 1	29/07/2012	Scheduling	1
BBC News at One	BBC 1	02/08/2012	Scheduling	1
BBC News at Six	BBC 1	30/07/2012	Generally accepted standards	1
BBC News at Ten	BBC 1	30/07/2012	Generally accepted standards	1
Big Yorkshire Breakfast	Pulse Radio	n/a	Generally accepted standards	1
Blackberry's sponsorship of Sky Atlantic	Sky Atlantic	10/07/2012	Materially misleading	1
Blackberry's sponsorship of Sky Atlantic	Sky Atlantic	15/07/2012	Materially misleading	1
Bluebird Daytime	SportxxxGirls	24/07/2012	Participation TV - Harm	1
Breakfast	BBC 1	n/a	Advertising/editorial distinction	1
Breakfast Show	Rock FM	13/07/2012	Competitions	1
Britain's Secret Treasures	ITV1	17/07/2012	Materially misleading	1
Britain's Strangest Pets	Channel 5	01/08/2012	Materially misleading	9
Cards of Destiny	MATV	03/08/2012	Advertising content	1
Casualty	BBC 1	21/07/2012 22/07/2012	Violence and dangerous behaviour	6
Channel Promotion	Comedy Central	22/07/2012	Hypnotic and other techniques	1

Cheekybingo.com's sponsorship of The Jeremy Kyle Show	ITV1	n/a	Generally accepted standards	2
Chris Moyles	BBC Radio 1	20/06/2012	Offensive language	1
Come Dine with Me	Channel 4	22/07/2012	Advertising/editorial distinction	1
Come Dine with Me	Channel 4	31/07/2012	Race discrimination/offence	1
Coronation Street	ITV1	23/07/2012	Offensive language	1
Coronation Street	ITV1	30/07/2012	Drugs, smoking, solvents or alcohol	1
Daybreak	ITV1	18/07/2012	Generally accepted standards	1
Deal or No Deal	Channel 4	25/07/2012	Generally accepted standards	1
Doctors	BBC 1	26/07/2012	Generally accepted standards	1
Don't Tell the Bride	Really	22/07/2012	Offensive language	1
Don't Tell the Bride	Really	31/07/2012	Offensive language	1
EastEnders	BBC 1	23/07/2012	Flashing images/risk to viewers who have PSE	1
EastEnders	BBC 2	30/07/2012	Generally accepted standards	1
Emmerdale	ITV1	24/07/2012	Crime	1
Euro 2012 Live	ITV1	11/06/2012	Generally accepted standards	1
Falling Skies	FX HD	13/07/2012	Outside of remit / other	1
Falling Skies (competition)	FX	03/07/2012	Competitions	1
Four Rooms	More4	30/07/2012	Offensive language	1
Halfords' sponsorship of Happy Motoring on Dave	Dave	n/a	Generally accepted standards	1
Hirsty's Daily Dose	Capital Yorkshire	27/06/2012	Generally accepted standards	1
Hollyoaks	Channel 4	18/07/2012	Race discrimination/offence	1
Hollyoaks	Channel 4	18/07/2012	Harm	1
Horizon	BBC 2	23/07/2012	Advertising/editorial distinction	1
Horizon	BBC 2	23/07/2012	Advertising/editorial distinction	1
Hotel Inspector	Channel 5	10/07/2012	Nudity	1
Hunted (trailer)	BBC 1	02/08/2012	Scheduling	1
ITV News and Weather	ITV1	17/07/2012	Sexual orientation discrimination/offence	1
ITV News at Ten and Weather	ITV1	01/08/2012	Due impartiality/bias	2
Jimmy Carr	Channel 4	30/07/2012	Religious/Beliefs discrimination/offence	4
Jon Richardson: A Little Bit OCD (trailer)	Channel 4	18/07/2012	Disability discrimination/offence	1
Ken Livingstone and David Mellor	LBC	14/07/2012	Materially misleading	1
Let's Do Lunch... With Gino and Mel	ITV1	24/07/2012	Religious/Beliefs discrimination/offence	1

Lorraine	ITV1	25/07/2012	Due impartiality/bias	1
Lorraine	ITV1	27/07/2012	Gender discrimination/offence	1
Mad Week (trailer)	Channel 4	23/07/2012	Disability discrimination/offence	1
Mike Zeller	BBC Radio Cumbria	25/07/2012	Generally accepted standards	1
Morning Show	Absolute Radio	22/07/2012	Generally accepted standards	1
Most Haunted	Pick TV	19/07/2012	Scheduling	1
Murder She Wrote Trailer	ITV3	19/07/2012	Generally accepted standards	1
My Daughter the Teenage Nudist	More4	01/07/2012	Gender discrimination/offence	1
My Daughter the Teenage Nudist	More4	24/07/2012	Gender discrimination/offence	1
My Daughter the Teenage Nudist	More4	24/07/2012	Generally accepted standards	1
My Strange Addiction (trailer)	Discovery Real Time	n/a	Animal welfare	1
My Strange Addiction (trailer)	Discovery Real Time	15/06/2012	Scheduling	1
My Teenage Diary	BBC Radio 4	27/06/2012	Offensive language	1
NCIS: Los Angeles	TV3	n/a	Scheduling	1
News	West Sound Radio	23/07/2012	Commercial communications on radio	1
Newsbeat	BBC Radio 1	26/07/2012	Generally accepted standards	1
Olympic Opening Ceremony	BBC 1	27/07/2012	Generally accepted standards	1
Olympics 2012	BBC	05/08/2012	Outside of remit / other	1
Olympics 2012	BBC	n/a	Outside of remit / other	1
Olympics 2012	BBC 1	27/07/2012	Generally accepted standards	2
Olympics 2012	BBC 1	27/07/2012	Outside of remit / other	3
Olympics 2012	BBC 1	28/07/2012	Generally accepted standards	1
Olympics 2012	BBC 1	29/07/2012	Race discrimination/offence	1
Olympics 2012	BBC 1	29/07/2012	Generally accepted standards	2
Olympics 2012	BBC 1	30/07/2012	Materially misleading	1
Olympics 2012	BBC 1	04/08/2012	Race discrimination/offence	1
Olympics 2012	BBC 1	05/08/2012	Disability discrimination/offence	2
Olympics 2012	BBC 1	05/08/2012	Generally accepted standards	2
Olympics 2012	BBC 1	06/08/2012	Outside of remit / other	1
Olympics 2012	BBC Olympic Channel (Sky)	28/07/2012	Outside of remit / other	1
Olympics' Most Amazing Moments	BBC 3	18/07/2012	Race discrimination/offence	1
Olympics' Most Amazing Moments	BBC 3	20/07/2012	Race discrimination/offence	2

Olympics' Most Amazing Moments	BBC 3	25/07/2012	Race discrimination/offence	1
Panorama	BBC 1	19/07/2012	Outside of remit / other	1
Panorama	BBC 1	n/a	Outside of remit / other	1
Passport Patrol	Sky Livingit	13/06/2012	Animal welfare	1
Phones 4U's sponsorship of Films on 4	Channel 4	29/07/2012	Generally accepted standards	1
Phones 4U's sponsorship of Films on 4	n/a		Generally accepted standards	1
Playboy TV Chat	Playboy TV Chat	28/07/2012	Participation TV - Misleadingness	1
Private Benjamin	Channel 5	04/02/2012	Nudity	1
Programme Credits	BBC	n/a	Outside of remit / other	1
Programming	BBC channels	n/a	Outside of remit / other	1
Programming	Various	n/a	Gender discrimination/offence	1
Programming	Various	n/a	Sexual orientation discrimination/offence	1
QATAR Airways' sponsorship of Sky Weather	Sky News	n/a	Materially misleading	1
Real Crime	ITV1	30/07/2012	Fairness	1
Saturday Drama: Betrayal	BBC Radio 4	14/07/2012	Offensive language	1
Scrubs	E4	14/07/2012	Generally accepted standards	1
Silk	BBC 1	n/a	Religious/Beliefs discrimination/offence	1
Sketchorama	Radio 4 Extra	17/07/2012	Generally accepted standards	1
Sky News	Sky News	03/08/2012	Generally accepted standards	1
Sky News	Sky News	04/08/2012	Due impartiality/bias	1
Sky News at Nine	Sky News	23/07/2012	Advertising/editorial distinction	1
Sky News with Kay Burley	Sky News	24/07/2012	Generally accepted standards	1
Sleeping with the Enemy	E4	22/07/2012	Offensive language	1
Sportsround	BBC Radio Scotland	29/07/2012	Generally accepted standards	1
Sportsworld	BBC Radio 5 Live	22/07/2012	Due impartiality/bias	1
Stars HQ	UMP Stars	27/06/2012	Advertising/editorial distinction	1
Steve Allen	LBC 97.3FM	20/07/2012	Commercial communications on radio	1
Steve Allen Early Breakfast	LBC	13/07/2012	Crime	1
Stirling Furniture's sponsorship of Superstar	STV	14/07/2012	Generally accepted standards	1
Superstar	ITV1	15/07/2012	Religious/Beliefs	1

			discrimination/offence	
Superstar	ITV1	20/07/2012	Religious/Beliefs discrimination/offence	1
Superstar	ITV1	23/07/2012	Gender discrimination/offence	1
Superstar	ITV1	23/07/2012	Generally accepted standards	1
Ted's sponsorship of Family Guy	FX	18/07/2012	Drugs, smoking, solvents or alcohol	1
Teleshopping	More4	n/a	Teleshopping	1
The Archers	Radio 4	n/a	Outside of remit / other	1
The Bad Boy Olympian	BBC 3	24/07/2012	Disability discrimination/offence	1
The Bassman	Capital London	25/07/2012	Offensive language	1
The Chris Evans Breakfast Show	BBC Radio 2	25/07/2012	Commercial communications on radio	1
The Hotel Inspector	Channel 5	26/07/2012	Generally accepted standards	2
The Inbetweeners Top Ten Moments	E4	30/07/2012	Animal welfare	1
The Jeremy Kyle Show	ITV1	24/07/2012	Generally accepted standards	1
The Mark Lima Show	Citybeat 102.5 FM	03/07/2012	Offensive language	1
The One Show	BBC 1	19/07/2012	Race discrimination/offence	17
The Only Way is Essex	ITV2	01/08/2012	Sexual orientation discrimination/offence	1
The Reader	Film4	25/07/2012	Gender discrimination/offence	1
The Unbelievable Truth	BBC Radio 4	04/04/2011	Generally accepted standards	1
The Wright Stuff	Channel 5	25/07/2012	Generally accepted standards	2
This Morning	ITV1	20/07/2012	Religious/Beliefs discrimination/offence	2
This Morning	ITV1	26/07/2012	Generally accepted standards	1
This Morning competition	ITV1	n/a	Competitions	1
Tonight	ITV1	02/08/2012	Materially misleading	2
Top Gear	BBC 2	27/02/2011	Religious/Beliefs discrimination/offence	1
Ummah Global Relief Charity Appeal	Ummah Chanel	25/05/2012	Charity appeals	1
Undercover Boss	4Seven	24/07/2012	Age discrimination/offence	1
UTV Live	UTV	13/07/2012	Due impartiality/bias	1
Vernon Kay	BBC Radio 1	21/07/2012	Generally accepted standards	1
Wallander	BBC 1	22/07/2012	Violence and dangerous behaviour	4
Who's On Heart Competition	Heart FM	n/a	Competitions	3
World's Maddest Job	Channel 4	25/07/2012	Outside of remit / other	1

Interview				
World's Strictest Parents	Watch	10/07/2012	Offensive language	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 9 and 22 August 2012.

Programme	Broadcaster	Transmission Date
Advertising minutage	Vox Africa	Various
Big Brother	Channel 5	2 August 2012
Cutting Edge: Lifers	Channel 4 and Channel 4+1	25 June 2012
Elite TV	Elite TV	15 July 2012
Graham Fisher	The 'Bridge (Stourbridge)	31 July 2012
Heart FM Breakfast	Heart FM	8 August 2012
HMS Ark Royal	Discovery	1 August 2012
News	Islam Channel	8 June 2012
Politics and Media	The Islam Channel	11 June 2012
Programming	Asian Sound Radio	9 April 2012
Saturday Night Dance	102.5 The Bridge	4 August 2012
Sunday Brunch	Channel 4	12 August 2012
Terra Nova	Sky1	8 July 2012
The Buzz	Phonic FM	10 August 2012
The News	Russia Today	12 July 2012
The Only Way is Essex	ITV2	12 August 2012
The Wright Stuff	Channel 5	17 August 2012
Thousand Pound Thursday competition	Northsound 2	Various

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/>.