

# **Ofcom Broadcast Bulletin**

**Issue number 112  
23 June 2008**

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## Introduction

Ofcom's Broadcasting Code ("the Code") took effect on 25 July 2005 (with the exception of Rule 10.17 which came into effect on 1 July 2005). This Code is used to assess the compliance of all programmes broadcast on or after 25 July 2005. The Broadcasting Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

The Rules on the Amount and Distribution of Advertising (RADA) apply to advertising issues within Ofcom's remit from 25 July 2005. The Rules can be found at <http://www.ofcom.org.uk/tv/ifi/codes/advertising/#content>

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

It is Ofcom policy to state the full language used on air by broadcasters who are the subject of a complaint. Some of the language used in Ofcom Broadcast Bulletins may therefore cause offence.

## Standards cases

### In Breach

#### The Montel Williams Show

*ITV2, 11 February 2008, 17:20*

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##### Introduction

Montel Williams hosts a chat show that regularly features the psychic, Sylvia Browne. In this particular programme, which was originally broadcast in the USA in 2003, the presenter interviewed the parents of Shawn Hornbeck, who had been missing for many weeks. No evidence relating to his disappearance had been discovered. The couple sought information from Sylvia Browne, who told them in the programme that he was dead. This proved later to be incorrect, because Shawn was found in 2007 and reunited with his parents. Two viewers were concerned that “the so-called ‘psychic’ ... was demonstrably wrong, and wrong in such a heartless and hurtful way that there is little excuse for broadcasting the programme.., certainly in the format it was shown”. One complainant also questioned whether such output should be shown as entertainment.

We sought ITV2’s comments with regard to the following Code Rules:

- Rules 2.1 and 2.3, which require broadcasters to apply generally accepted standards to protect viewers adequately against offensive material, which can be broadcast only if justified by the context; and
- Rules 2.7 and 2.8, which require “demonstrations” of the paranormal (among other things) that are broadcast for entertainment purposes to be clear as such and not to contain life changing advice directed at individuals.

##### Response

ITV2 admitted a breach of Rule 2.1 of the Code. The programme had been re-broadcast without amendment and the broadcaster apologised for any offence this may have caused. It regretted that its Acquired Compliance Team reviewer was unaware of the developments surrounding the case in the five years since the programme had originally been recorded and broadcast. The broadcaster added that, “had ITV2 been made aware of these matters, the programme would not have been broadcast...in this form”. It also regretted that the programme’s distributors had not alerted it to the issues, “...despite customary warranties appertaining to the supply of acquired programming”. ITV2 said that, in the absence of such a warning, it was not feasible to research every item in an acquired programme. However, to help prevent any recurrence of the problem, the broadcaster added that it had:

- removed the episode from ITV stock, to avoid further broadcast;
- discussed the matter with programme distributors, emphasising the need for relevant information to be provided swiftly; and
- reviewed similar material in other episodes.

Nevertheless, ITV2 believed that the programme’s treatment of the subject matter was suitable for broadcast “in principle”. It claimed that no “demonstration” of the paranormal was broadcast and that the psychic featured in the programme “simply

told the parents information which she purported to relay after obtaining it by psychic means”, adding: “While the information she offered would have been hard for any parent to bear ... She did not offer any “life-changing advice”.”

ITV2 acknowledged that the material broadcast may not have been to everyone’s taste but believed it was acceptable for broadcast, “in the context of the channel, scheduling and its viewer expectation”. Had the disappearance of Shawn Hornbeck not ended as it did, ITV2 doubted that any viewer would have taken issue with the broadcast.

## **Decision**

Ofcom welcomes ITV2’s apology and acknowledgement that it failed to provide viewers with adequate protection from the broadcast of offensive material, in breach of Rule 2.1 of the Code. The unedited re-broadcast in this instance was likely to offend viewers, as it featured unnecessarily the distress of Shawn Hornbeck’s parents. It was inappropriate to broadcast this content in view of the fact that by the time of re-broadcast Shawn Hornbeck had been found and reunited with his parents. Ofcom welcomes the action ITV2 has taken to minimise the risk of material being re-broadcast in future in ignorance of events that affect its suitability for transmission.

Ofcom also considered whether the nature of the broadcast in itself (parents seeking advice on a missing child from a psychic) was offensive - and, if so, whether it was justified by context. We judge that in this case it was inappropriate to allow parents who were desperate to know what had happened to their missing son to seek the services of a psychic on air. Such material was likely to offend viewers. Confirmation of their son’s supposed death, the couple’s distress and the implications of this information for their future was very serious content that viewers were most unlikely to have expected in an entertainment programme shown in the later afternoon on a mainstream channel. The broadcast was not therefore justified by context, in breach of Rule 2.3 of the Code.

Demonstrations of the paranormal (in this case, psychic practice) clearly took place in the broadcast. For the purposes of Rules 2.7 and 2.8 of the Code, a “demonstration” does not necessarily require a clinical/scientific approach to the way in which it is presented or a supposed proof of its validity. The psychic featured in this broadcast appears regularly in this chat show, when members of the studio audience are invited to use her services. Ofcom is satisfied on balance that, within the context of the programme, it is normally clear to viewers that the demonstrations of psychic practice are intended for entertainment purposes. On this occasion, we consider that the purpose of the psychic practice was not entertainment. Under either circumstance, Rule 2.8 states that any advice given must not be “life-changing”.

The purpose of Rule 2.8 is to protect participants and viewers from potentially harmful material. A demonstration of the paranormal (in this case, a psychic) could result in participants acting on information in a way that could be harmful to them. Here, Shawn Hornbeck’s parents were advised of their son’s supposed death by the psychic. Such information clearly had the potential to change their lives drastically, as would news of the death of any close relative, but particularly a child. For example, in this case, Mr and Mrs Hornbeck could have stopped searching for their son as a result of the psychic’s advice. However, we also note that this programme was a re-broadcast on ITV2 originating from the USA and was five years old. This UK broadcast was therefore most unlikely to cause any harm to the Hornbeck family.

In terms of the potential harm to viewers, however, Ofcom considers that demonstrations of psychic practice as in this programme could harm vulnerable viewers by suggesting that psychics could or should provide susceptible individuals (like the Hornbeck parents in this case) with life-changing advice. In this case, the broadcast therefore breached Rule 2.8 of the Code.

**Breach of Rules 2.1, 2.3 and 2.8**

## **The Bush and Troy Show**

*GWR 96.3 FM (Bristol and Bath), 20 March 2008, 08:30*

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### **Introduction**

*The Bush and Troy Show* is the regular breakfast programme for the local commercial radio station, GWR 96.3 FM. Two listeners contacted Ofcom to complain that, during a promotion for the station, GWR attempted to mask the terms “fucking” and “motherfucker” but the masking was only partial, which meant that the words were so obvious that the same offence was caused had the terms had been used in their entirety. The wording of the promotion was as follows: *“Easter bunny here. If you laugh at my big teeth again, I’ll knock yours out. Happy f(\*)cking Easter, you fat motherf(\*)cker”*.

Ofcom asked the station to comment in relation to Rules 1.14 (the most offensive language must not be broadcast when children are particularly likely to be listening) and 2.3 (generally accepted standards) of the Code.

### **Response**

GCap Media (“GCap”), which owned the station at the time of transmission and was responsible for compliance at GWR, said it apologised unreservedly for the inclusion of this material. It wholly accepted that the segment was not suitable to be broadcast at breakfast time or, it conceded, at any time. It said the incident occurred because the presenters believed ‘bleeping out’ the expletives would be sufficient to comply with the Code. It added that the material was not checked by the programme’s producer or the production team before it went on air because GWR’s editorial resources were “considerably stretched” by a marketing promotion it was involved in. However, as soon as the station became aware of the material it was immediately taken off air. As a measure of how seriously it took the complaints, GCap said the editorial policy on the use of offensive language had been tightened at GWR and that there were now clear consequences for personnel should such an incident occur again.

### **Decision**

While an attempt had been made to mask the language used, it was not effective as, even though the vowels in the words had been ‘bleeped’, it was absolutely clear that the most offensive language could still be heard. The masking of the words in fact resulted in the unwelcome effect of drawing listeners’ attention to the terms. The material was broadcast in the morning at a time when children would have been particularly likely to be listening on the school run with their parents or carers. This resulted in a breach of Rule 1.14.

The words “fuck” and “motherfucker” are considered two of the most offensive words. There was no justification for the use of these words. There was therefore also a breach of Rule 2.3. We welcome the acceptance from GCap that the material was wholly inappropriate to be broadcast. However the decision to broadcast these expletives was a clear misjudgement and failure of compliance.

### **Breach of Rules 1.14 and 2.3**



## **Battle of the Hollywood Hotties**

*E! Entertainment, 8 April 2008, 17:00*

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### **Introduction**

*Battle of the Hollywood Hotties* is a light entertainment documentary which features the careers of various international celebrities. Ofcom received one complaint about the use of word “fucking” by the narrator in the programme in view of fact that it was broadcast before the watershed. Ofcom asked the broadcaster for its comments under Rule 1.14 of the Code which states that “the most offensive language must not be broadcast before the watershed.”

### **Response**

E! Entertainment explained that the expletive was broadcast due to human error. Unfortunately, the broadcaster’s quality control team failed to identify it when re-editing the programme. Since becoming aware of the matter, E! Entertainment has introduced additional improvements to strengthen its compliance procedures.

### **Decision**

While Ofcom welcomed the remedial actions taken by the broadcaster, we are concerned that such a clear example of strong language was allowed to pass undetected by its quality control team. Our research indicates that the word “fuck” and its derivatives are considered by respondents to be the most offensive language.

Broadcasters must have in place robust procedures to ensure compliance with the Code. The broadcast of such language before the 21:00 watershed is in breach of the Code.

### **Breach of Rule 1.14**

## Thunder Crew link

*Mercia FM (Coventry & Warwickshire), 6 March 2008, 14:40*

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### Introduction

Members of Mercia FM's "Thunder Crew" occasionally report from locations around Coventry and Warwickshire. During this particular link, a "Thunder Co-ordinator" said:

*"...I'm going to get myself over to Coventry's new Sytner Car Garage on Holyhead Road, between now and Sunday, and pick myself up a brand new BMW M3 saloon ... it's all very sparkly. They're unveiling this new M3. Get yourself down there before Sunday and have a look at all the new nice shiny cars they're showing off. We'll be out and about ... giving out prizes, giving out leaflets, explaining what's going to be down there. So come and find us in and about Coventry and get down to Sytner on the Holyhead Road...".*

A listener was concerned by what he believed were "continuous plugs" in programming.

Section 10 of the Code concerns, among other things, commercial references in programmes. Rules 10.1, 10.3, 10.4 and 10.5, respectively, prohibit the following in programming:

- the broadcaster's loss of editorial control over programme content;
- the promotion of products and services;
- undue prominence being given to products and services; and
- product placement.

We sought Mercia FM's comments on the complainant's concern, with regard to these Rules.

### Response

GCap Media plc ("GCap"), which owned Mercia FM at the time of broadcast, explained that the "Thunder Crew" ... is employed to engage with the wider audience by visiting various sites to promote the radio station or assist with activities the station is involved in; for example, event-led competitions". They occasionally report back to the studio, explaining their movements and/or location, "...to ensure they remain visible, promote the station and increase the audience base. In addition they sometimes give out car stickers or promotional items from the radio station to increase awareness of the station".

GCap said that, "...this case arose from an overly zealous Thunder Co-ordinator who was relatively new and naively thought he was being creative in how he set up the audio link". It apologised for the broadcast, adding: "...it should not have happened and we have taken appropriate steps by...explaining the restrictions contained in Section 10 [of the Code] to all Thunder Co-ordinators employed by Mercia FM".

GCap assured Ofcom that BMW had at no time influenced the content of the broadcast or made payment or other consideration for any promotion within programming. It added that the promotion of BMW or any of its products was not deliberate and claimed that the undue prominence of products or services in programming was minimal. GCap believed that the references to BMW were editorially justified "to the extent that the references were made pursuant to

describing the Thunder Co-ordinator's intended location or movement which he was then expected to report back to the radio station".

In conclusion, GCap reiterated that this was "a simple error on the part of a young, inexperienced individual", adding that both GCap and Mercia FM had sought promptly to ensure future compliance with the Code.

### **Decision**

Ofcom recognises that a radio broadcaster may seek to widen and/or interact with its audience by:

- holding events at local locations;
- broadcasting from those locations; and/or
- announcing on air its intention to do so.

To ensure the clear separation of programming from advertising, special care should be taken that related programming does not promote a product or service, as such locations are often retail-based. Ofcom expects broadcasters to ensure that any presenter or reporter involved in such content is aware of fundamental Code requirements. In this case, an inexperienced reporter was left to create his own output, with insufficient knowledge of the Code. While we welcome GCap's prompt response to prevent immediate recurrence, Ofcom expects broadcasters to ensure that procedures are in place, prior to broadcast, to ensure that new reporters comply with the Code.

Ofcom does not accept GCap's submission that the undue prominence of products or services in programming was minimal. We do not believe it is reasonable to say that there was editorial justification to refer to the garage and its products in such exuberant terms simply to describe the Thunder Co-ordinator's intended location. While we accept GCap's assurance that no payment was made, the link was, in Ofcom's view, likely to give listeners the impression that a 'deal' had been done.

The reporter's approach resulted in little more than the promotion of products and services, in breach of Rule 10.3 of the Code. The reporter not only established where he intended to be, but promoted the new BMW M3 saloon, after which, further references within programming to the associated brand, model, location or generic product, were not editorially justified.

### **Breach of Rules 10.3 and 10.4**

## **Look Who's Talking**

*LIVING, 5 April 2008, 17:00*

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### **Introduction**

*Look Who's Talking* is an adult comedy film made in the late 1980s about parents whose new-born baby can talk. Ofcom received one complaint about the frequent use of the words "bastard" and "shit" in this broadcast. Ofcom noted that in addition one character used the word "fuck". It therefore asked Virgin Media Television, which owns and is responsible for compliance at LIVING, for its comments with regards to the following rules of the Code:

- Rule 1.14 which states that the "most offensive language must not be broadcast before the watershed;" and
- Rule 1.16 which requires broadcasters to avoid frequent use of offensive language in programmes shown before the watershed.

### **Response**

The broadcaster explained that following its normal procedure, this film had been viewed prior to transmission and the bad language had been edited. However, due to a technical problem, the edits had not been saved. This error was however not identified by the compliance editor and consequently the original version had gone to air.

Virgin Media Television acknowledged that the incident was a significant error and has since amended its compliance process to ensure that similar technical problems in future would trigger a manual re-check of any material which could have been affected. Additionally, it planned to issue an apology to viewers when the film is broadcast again. It said that this would contain an assurance as to its suitability for a family audience.

### **Decision**

Ofcom notes that it had recently upheld a similar complaint concerning the most offensive language against LIVING concerning the reality show *Dirty Cows* (Bulletin 100, 14 January 2008). Ofcom also notes that in this case the broadcast of the incorrect version was not deliberate and welcomes the new measures taken by Virgin Media Television to improve compliance in future as regards editing out inappropriate material. However, guidance issued in Broadcast Bulletin 89 reminded broadcasters that they were under a clear duty to ensure that robust procedures were in place, supported by a sufficient number of appropriately qualified and trained staff, to ensure full compliance with the Code in respect to the broadcast of unsuitable material pre-watershed.

Ofcom research is clear that the word "fuck" and its derivatives were considered by viewers to be the most offensive language. Additionally, we noted several instances of offensive language throughout the film, which Ofcom considered to be too frequent to be acceptable before the watershed. It was also noted that the film was transmitted on a Saturday. The broadcast was therefore in breach of Rules 1.14 and 1.16.

### **Breach of Rules 1.14 and 1.16**

## **New Year Message**

*First Baltic Music Channel, 1 January 2008 at 01:00*

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### **Introduction**

The First Baltic Music Channel (“First Baltic”) is a Russian language music and entertainment channel broadcasting to the Baltic states and surrounding regions which is licensed in the United Kingdom by Ofcom. During the broadcast of a music video on this channel early in the morning of 1 January 2008, various New Year text messages written in Russian from viewers were shown on screen. One text (when translated) stated:

*“To the Aryans! Happy New Year! Love, happiness and success in the New Year! From the Skinheads”.*

This text message was shown in total three times within five minutes.

A complaint was made to Ofcom by the Lithuanian television regulator which said that neo-Nazi groups are a problem in the region and felt that they “can do without racists wishing other racists a happy new year”. First Baltic’s licence is held by Baltic Media Alliance Limited (“Baltic Media Alliance”). Baltic Media Alliance is responsible for the compliance of the First Baltic Music Channel. Ofcom wrote to the Baltic Media Alliance requesting it to comment on how the text complained of complied with Rule 2.3 of the Code (offensive material must be justified by the context).

### **Response**

Baltic Media Alliance said that all its programmes comply with the Code. It said that the moderator who allowed the text message to be broadcast had checked the wording of the message with Microsoft Word’s dictionary which stated that “Arian” was a “follower of the ancient Greek Christian theologian Arius” and that a “skinhead” was either a nickname or a British description for a closely-cropped hairstyle. It said that neither one of these terms breached the Code. It said that moderators have a short time in which to check and consider any message to be broadcast and that in instances where there is uncertainty, moderators are instructed to check the meanings of words through the Microsoft Word dictionary.

However, after being made aware of the complaint to Ofcom, Baltic Media Alliance said it double checked the message with “linguistic expertise” which brought out other meanings in the text which could “...theoretically offend some viewers”. Since the broadcast of the text message, the Baltic Media Alliance said that it had given additional training to moderators to ensure that they clearly understand all the norms and standards concerning programme context and offensive material. It stated that moderators are now instructed that if at least one of the meanings of any word in a message is “alarming” and does not comply with the Code, then the message should not be broadcast.

### **Decision**

Rule 2.3 states that “in applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context”. Ofcom considered the broadcaster’s response that, although the moderator initially failed to recognise the potentially offensive nature of the text message, it was now accepted that the words used in the message could “theoretically” offend. However, in Ofcom’s

view, the word Aryan clearly has a potentially offensive meaning i.e. in Nazi ideology, a Caucasian of non-Jewish descent. Therefore, given the context of the use of the words “Aryans” and “Skinheads” in the same text message it should have alerted the moderator to the fact that the message had racist overtones and therefore had the potential to cause considerable offence to viewers. We considered that it was highly unsatisfactory for the broadcaster to use moderators who were unable to understand in context the meaning of words and phrases in text messages and to identify potentially offensive material. Ofcom therefore concluded that the text message complained about breached generally accepted standards and was not sufficiently justified by context. It was therefore in breach of Rule 2.3.

Ofcom further considered that despite the remedial action taken by the broadcaster of additional training for moderators to recognise potentially offensive material, it was unsatisfactory for the broadcaster, in meeting its requirements of the Code, to rely solely on the meanings provided by the Microsoft Word dictionary. Ofcom licensees must always ensure that any material they transmit complies with the Code. Ofcom considered this to be a serious breach of its Code because of the nature of the contravention.

### **Breach of Rule 2.3 of the Code**

## Supernatural Trailer

ITV2, various dates January 2008

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### Introduction

A trailer for the science fiction drama *Supernatural* was shown on several occasions in mid-January 2008 at various times before the 21:00 watershed. The trailer included some brief scenes of characters morphing into demons, together with menacing images of the paranormal and violence linked to the supernatural. One viewer complained that the trailer was too frightening to be shown during the day when children are viewing television.

Ofcom asked ITV2 for a response with reference to Rule 1.3 of the Code (appropriate scheduling).

### Response

ITV2 explained that it follows a rigorous process with regards to the production, compliance and scheduling of programme trailers. All promotions are produced in-house by ITV Creative and the decision is made over when they should be broadcast, for example post-watershed or not around children's programmes. This information is shared internally within ITV2 and programmed into the computer system which governs ITV2's broadcast schedules.

On this occasion however there was an "isolated failure" in the compliance process. This trailer should have been marked as restricted from being shown around programmes that would typically attract a significant child audience. However, as a result of human error, this did not happen and the trailer was shown by mistake. The broadcaster apologised to the complainant and said that it has revised its compliance procedures to ensure that such a mistake does not occur again.

### Decision

Rule 1.3 states that "Children must...be protected by appropriate scheduling from material that is unsuitable for them". When considering the suitability of the content of a trailer in relation to Rule 1.3, Ofcom has to take into account that viewers come across trailers without warning and therefore the potential for harm (or offence) is greater than for programmes which are appropriately signposted and scheduled. From audience research we also know that younger children in particular, are easily frightened by the 'morphing' of characters into threatening creatures<sup>1</sup>.

In this case, the content of this trailer was dark and sinister with disturbing scenes of paranormal activity. These included clips of a car being driven through a 'ghost woman', a man raising a weapon above his head and bringing it down violently on a demonic figure that lay beneath him and a woman screaming in terror as she rose from being submerged in water. It was shown on several occasions before the watershed, including during *American Idol* and *Emmerdale* which both appeal to a family audience. Audience figures reveal for example that during the *Emmerdale* omnibus shown at 11:00 on 20 January 2008, a significant number of children were viewing (over 15% of the total audience). In Ofcom's opinion the trailer was not scheduled appropriately.

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<sup>1</sup> ITC Research [Emulation, Fears and Understanding: Children and Television Advertising](#)

Ofcom had received similar complaints in 2007 about a previous trailer for *Supernatural*. On that occasion, partly because of assurances from the broadcaster about not showing such content in future, Ofcom decided to resolve the issue (reported in Broadcast Bulletin 96, 5 November 2007). However, given that a similar compliance problem occurred only some eight months later, Ofcom considers it appropriate to record a breach of Rule 1.3 despite new assurances from the broadcaster.

### **Breach of Rule 1.3**



## **EastEnders**

*BBC One, 21 and 24 March 2008, 20:00*

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### **Introduction**

Two episodes of *EastEnders*, broadcast over the Easter weekend on Good Friday and Easter Monday, featured the drugging and the live burial of the character Max Branning by his wife, Tanya, and her accomplice, Sean. In the first episode, the lead up to the burial was broadcast, with Tanya drugging Max and then burying him alive. In the final scenes of this episode Max lies in the coffin under sedation and pleads with Tanya as the coffin lid is placed on top of him and he is left in darkness. The next part of the storyline was broadcast three days later. Max is in the coffin underground breathing heavily and sobbing before Tanya returns to the burial site and releases Max from the grave, alive.

Ofcom received 116 complaints from viewers who believed the scenes and storyline were unsuitable for the time of broadcast, particularly given the high proportion of children watching. A number of these complaints were from parents who expressed concern that their children were distressed by the content, some of whom had difficulty sleeping after viewing the scenes.

Ofcom asked the BBC for comments in relation to Rules 1.3 (children must be protected by appropriate scheduling), 1.11 (violence must be appropriately limited in programmes broadcast before the watershed), and 2.3 (broadcasters must ensure that material which may cause offence is justified by the context).

### **Response**

The BBC stated the storyline had been crafted in a responsible manner with recognition of its potential sensitivity for a pre-watershed audience, which could be expected to include a proportion of children. It believed sufficient steps had been taken to alert viewers to the storyline in advance and keep it within the expectations of the audience. The storyline had not been arbitrarily chosen but reflected a previous occasion some months earlier when Max had confided to his wife Tanya that his “worst nightmare” related to an occasion in his childhood when his father had put him in a coffin overnight.

Over the following months, the storyline of Max’s apparently successful machinations over custody of their children unfolded. The live burial storyline was therefore considered by the BBC to be an appropriate act of revenge by a wife driven to the extremity of desperation. Furthermore, the broadcaster said, the scheduling of the episodes over the Easter Bank Holiday provided additional context, given that there is an established expectation that soaps such as *EastEnders* bring the most intense storylines to a climax over public holidays.

In terms of the presentation of the storyline, the BBC noted that it involved no explicit violence and that the lead up to the burial scenes broadcast on 21 March 2008 was “...carefully paced with several indications of the direction of the storyline offered”. To further minimise offence the BBC had alerted viewers to the content with a pre-transmission announcements stating: “*First a cruel and chilling revenge, it’s Max’s worst nightmare as Tanya prepares his last supper...*” (21 March) and “*EastEnders now on BBC1...and more powerful scenes as Max’s worst nightmare continues...*” (24 March).

However, the BBC admitted that the 600 plus complaints it had received suggested that the emotional impact had been greater than anticipated. This, the BBC considered, suggested the handling of the storyline went beyond the expectations of some of the audience and was not justified by the context. For these reasons the BBC accepted the two programmes were in breach of Rules 1.3, 1.11 and 2.3 and said that the response from viewers would help to guide programme makers on how to handle such exceptional storylines in the future.

The BBC's Editorial Complaints Unit separately reported its decision regarding the complaints it had received on 9 May 2008. The complaints were upheld on the grounds that the emotional impact of the storyline was stronger than had been considered likely and had caused upset with a segment of the audience that was neither anticipated nor intended.

### **Decision**

Ofcom noted the BBC's response that the scenes went beyond the expectations of viewers and therefore were a breach of Rules 1.3, 1.11 and 2.3 of the Code.

In considering the material, Ofcom took the view that the subject matter itself did not exceed the boundaries of acceptability for a pre-watershed drama such as *EastEnders*. The issue here was whether the treatment of the storyline meant it was suitable for a pre-watershed audience that regularly included a significant number of children.

Rule 1.3 requires that children must be protected by appropriate scheduling from material that is unsuitable for them. Appropriate scheduling is judged by a number of factors including: the nature of the content; the likely number and age range of the audience; the start and finish time of the programme; and likely audience expectations.

In the first episode the scenes involving the burial alive of Max were harrowing and dark in nature. Sean and Tanya drag Max's sedated body through a dark wood, throw it into the shallow grave and, as the effect of the sedative decreases, Max is clearly aware of the coffin lid coming down on top of him as he shouts out and bangs on the lid desperately. In this episode there were no lighter storylines to balance this disturbing central plot and there was no resolution to the storyline in that episode.

The opening scenes of the second episode were in complete darkness, to portray Max inside the coffin, the only sound being his laboured breathing and his sobbing. Max is alert to his environment as the effect of the sedative has worn off. As the sound of the earth is being shovelled on top of the coffin lid, he frantically tries to telephone home on his mobile for help, managing to make contact only for the signal to then fail as the burial is completed. In Ofcom's view, taken as a whole, the scenes of the burial alive shown in both episodes had a seriously disturbing element to them. Overall, the storyline and its treatment had more in common with a dark psychological thriller than a pre-watershed drama.

Further, in our view, the information supplied at the start of the programmes did not adequately prepare viewers for the extent of the distressing scenes that followed. Some regular viewers may have been aware of what "Max's worst nightmare" was and how the storyline might unfold, but the subsequent scenes were not appropriate for a pre-watershed audience and therefore the expectations of the audience for this

series were not sufficiently respected. The programmes were therefore in breach of Rule 1.3.

Rule 1.11 requires that violence, its after-effects and descriptions of violence, must be appropriately limited before the watershed and must be justified by context. Given that the nature of the burial scenes in both episodes produced an overall atmosphere of threat and menace at a level and to an extent not suitable before the watershed they were not appropriately limited, and nor were they justified by the context. There was also therefore a breach of Rule 1.11.

The level of distress generated by the treatment of the storyline and the lack of contextual justification, which resulted in the scenes exceeding audience expectations, also resulted in a breach of generally accepted standards for a popular pre-watershed soap opera shown on the flagship BBC television channel. Many viewers regard *EastEnders* as suitable for family viewing with children. For the reasons already stated the scenes of Max being buried alive were offensive and not justified by the context. Rule 2.3 was also contravened as a result.

**Breaches of Rules 1.3, 1.11 and 2.3.**

## Resolved

### Import Export

*XFM 104.9, 30 March 2008, 18:50*

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#### Introduction

A listener objected to the inclusion of the words “shit” and “motherfucker” in a song played on this station. The complainant felt this was offensive and inappropriate for a pre-recorded show at this time of day.

Ofcom asked GCap (which owned XFM at the time of transmission) for its comments concerning Rules 1.14 (the most offensive language must not be broadcast when children are particularly likely to be listening) and 2.3 of the Code (generally accepted standards).

#### Response

GCap apologised to anyone who may have been offended by this language, and explained that radio edits are regularly used to remove offending lyrics in their playlists, in accordance with the Code. However, on this occasion human error resulted in the wrong version of the song being played, rather than the edited version that did not contain the expletives. After the complaint came to light the edited version of the song was loaded onto the playout system to prevent any recurrence.

Without diminishing the seriousness of the complaint to Ofcom, GCap said XFM had itself received no complaints to date about the broadcast, and said that some of XFM's target audience (16 - 34 year olds with a core market target of male 20 -29 year olds) who may have been listening at the time are aware that similar language is used in wider society, and that such use is in turn reflected in the various forms of music that they listen to.

#### Decision

Ofcom research on offensive language, conducted in 2005, identified that while “shit” is considered fairly mild, “motherfucker” was considered to be an example of the most offensive language.

Ofcom noted the broadcaster’s apology, that the offensive language was broadcast as a result of human error and the steps taken to ensure this problem does not recur. Ofcom also took into account that this was an isolated incident which occurred on a niche station aimed at a predominantly adult audience and at a time when RAJAR figures typically indicate no children are listening to this show (RAJAR define children as between 4-14).

We therefore consider the matter resolved.

#### Resolved

## Fairness and Privacy Cases

### Not Upheld

#### **Complaint by Aerials and Satellites<sup>2</sup> brought on its behalf by Irwin Mitchell Solicitors**

*House of Horrors, ITV1, 29 May 2007*

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**Summary:** Ofcom has not upheld this complaint of unfair treatment in the broadcast and unwarranted infringement of privacy in the making and broadcast of the programme.

This edition of the undercover consumer affairs programme *House of Horrors* included a report on Aerials and Satellites, a TV aerial and satellite fitting and repair company. The programme alleged that the company provided a poor quality service and overcharged its customers. It also alleged that one of Aerials and Satellites engineers deliberately targeted older customers to overcharge.

Ofcom found that the allegations made in the programme about Aerials and Satellites were not unfair given the advice of an independent expert, the testimony of a former employee and the actions of the company's engineers and comments of its office staff as shown in the sections of surreptitiously filmed footage which were included in the programme. Ofcom also found that while the language used by the presenter to describe the actions of one of the company's engineers was irreverent it was not unfair given the nature of the nature of those actions and the fact that such language was in keeping with the established tone of the programme .

Ofcom found that the complainant was given an appropriate and timely opportunity to respond to the allegations made about it and that the programme included a fair representation of its response to these allegations. Ofcom also found that the use of surreptitiously filmed material in the programme was warranted in that it enabled viewers to assess the service provided by Aerials and Satellites and this material could not have been obtained by any other means. Ofcom found that it was not unfair for the programme to have included footage of one of the company's employees (Mr Clarke) responding to questions about the company's engineers given that he was the customer services manager and ITV's established point of contact with the company. In addition, Ofcom found that the broadcaster had made a legitimate editorial decision not to include some additional footage of one of Aerials and Satellites' engineers and that given that the programme gave a fair representation of the company, this editorial decision had not resulted in unfairness to it.

With regard to the complaint of unwarranted infringement of privacy in the making and broadcast Ofcom found that Aerials and Satellites, and the three members of staff on behalf of whom this complaint was made, did have a legitimate expectation of privacy in respect of the recording and broadcast of footage of the film crew's unannounced visit to the company's offices and that the complainants' privacy had been infringed in both the filming and broadcast of this material. However, Ofcom

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<sup>2</sup> Please note the complaint of unwarranted infringement of privacy in the making and broadcast of the programme was by Aerials and Satellites and three of its employees, namely Mr Ian Clarke, the Customer Service Manager; Mr Paul Ingrams, the Engineering Manager; and Mr John Scott, the firm's Accountant.

also found that these infringements were warranted by the public interest in demonstrating the response of Aerials and Satellites to the allegations made about it.

## Introduction

On 29 May 2007, ITV1 broadcast an edition of *House of Horrors*, its undercover consumer affairs programme. The episode included a report on a TV aerial and satellite fitting and repair company called Aerials and Satellites Ltd (“Aerials and Satellites”).

The programme noted that previous editions of *House of Horrors* had included unfavourable reports on engineers employed by Aerials and Satellites. It also said that after one of these reports a former employee of Aerials and Satellites had contacted the programme maker, Granada Television (“Granada”), regarding further alleged bad practice at the company. The programme indicated that its previous knowledge of the company coupled with the information volunteered by the former employee prompted it to send an undercover reporter to work as an engineer for Aerials and Satellites while he surreptitiously filmed the actions of the engineer with whom he was partnered.

The programme also indicated that it had then arranged for an independent aerial expert (Mr Kevin Dawson) to deliberately interrupt the power supply to an amplifier (which was located in a house where it had installed hidden cameras) by replacing a working fuse with one which was blown. It told viewers that it had done this in order to test the actions of one of Aerials and Satellites engineers (Mr Rob Marshall, whom the report said was also known as Mr Rob South) whom an actor posing as a ‘householder’ had called out to fix the fault. The programme showed the actions taken by Mr Marshall to fix the problem and included comments, made by the presenter and the independent aerial expert, alleging that he had unnecessarily fitted a new amplifier and had overcharged the ‘householder’.

The programme also included surreptitiously filmed footage recorded by an undercover reporter while she worked as an administrative assistant in Aerials and Satellites’ head office.

The programme subsequently showed the presenter, Jonathan Maitland, and the film crew making an unannounced visit to Aerials and Satellite’s head office to ask Mr Ian Clarke, the Customer Services Manager, to answer its questions. They were asked to stop filming and to leave the office.

The programme also featured Mr Maitland speaking to Mr Clarke on the telephone about overcharging by the company’s engineers.

Lastly, the programme explained that since filming it had received a formal written response from Aerials and Satellites and gave some details from that response. It also noted parts of a response provided by Mr Marshall about whom specific criticisms had been made within the programme.

Irwin Mitchell Solicitors (“Irwin Mitchell”) complained to Ofcom on behalf of Aerials and Satellites that it was treated unfairly in the programme as broadcast and that its privacy, and that of three of its employees, was unwarrantably infringed in both the making and the broadcast of the programme.

## The Complaint

### Aerials and Satellites' case

In summary, Aerials and Satellites complained that it was treated unfairly in the programme as broadcast in that:

- a) The tone of the programme was unfair because it was unnecessarily dramatic and included both unfair criticism of and unfounded and derogatory remarks about the company (for example, the reporter stated that the business was the “*modern equivalent of the highwaymen of the nineteenth century with masks on the back of horses*”). This included unfair speculation and comments based on material gained through surreptitious filming (i.e. comments made by office staff in response to questions to which they were not able to give factually correct answers).
- b) The programme unfairly failed to give the business an appropriate or timely opportunity to respond to the allegations made about it. Aerials and Satellites complained that:
  - i) Mr John Barnes (one of the owners of Aerials and Satellites) had been invited to be interviewed by the programme maker and was in the process of obtaining legal advice about how best to respond to this request at the time that the reporter and film crew made an unannounced visit to Aerials and Satellites' head office. Mr Clarke, the Customer Services Manager, had emailed the programme makers on 20 March 2007, the day before the film crew visited, to inform them of the situation.
  - ii) The programme makers unfairly ignored the owners' request for a short (10 to 15 second) statement to be read out as part of the programme. The words and phrases selected from this statement and used in the programme did not provide a fair representation of the company's position.
- c) The programme unfairly and disproportionately targeted certain members of staff without their knowledge or consent through surreptitious filming. By way of example Aerials and Satellites indicated that Mr Clarke was repeatedly asked questions about the supervision of the company's engineers despite having explained that this area was outside his remit. The complainant also noted that at no point was Mr Clarke provided with a clear explanation of the purpose of the filming; told how the footage would be used; or given an opportunity to preview the programme or the specific footage.
- d) The programme unfairly omitted footage which showed one of its engineers attending a *House of Horrors* property and providing a “reasonably priced and professional service”. In doing so the programme presented an unbalanced and misrepresentative picture of the company.

In summary, Aerials and Satellites complained that its privacy, and that of Mr Clarke, Mr Paul Ingrams, the Engineering Manager, and Mr John Scott, the firm's Accountant, was unwarrantably infringed in both the making and the broadcast of the programme in that:

- e) The reporter and film crew gained unauthorised access to the head office of Aerials and Satellites and took an unreasonable amount of time to stop filming and leave, despite being asked to do so repeatedly.

Aerials and Satellites stated that this episode of “doorstepping”<sup>3</sup> was not warranted because:

- i) No attempt was made to gain access to the building or staff “by invitation via the front door”.
- ii) The owners of the business had not been given sufficient time to respond to the programme maker’s request for an interview with a senior manager (as noted above they were seeking legal advice on how best to respond to this request).
- iii) It was not in the public interest to see “the workings of the business office staff”.
- iv) It was not in the public interest to record this footage because it could have been obtained by other means (namely a pre-arranged interview).

### **ITV’s case**

In summary ITV responded to Aerials and Satellites’ fairness complaint as follows:

- a) ITV denied that the tone of the programme was unfair. It said that the programme was fair and justified in its reporting on the activities of Aerials and Satellites, based on the evidence that the programme-makers had amassed over the past three years. The programme makers had witnessed Aerials and Satellites’ engineers making jobs up, inventing prices, departing from the Aerials and Satellites ‘price guide’ apparently at will, failing to give written quotes, overcharging and delivering incompetent work. It argued that the statement in the programme that the actions of one of the complainant’s engineers were like the “modern equivalent of highwaymen in the 19th Century...” might have been irreverent or disrespectful, but it was not unfair or inaccurate. The broadcaster noted that Aerials and Satellites had featured in two previous *House of Horrors* programmes and that previously the firm had said that its engineers followed a code of practice and that if they ‘ripped off’ customers they were not tolerated. ITV also said that the programme maker used surreptitious filming in order to establish an accurate picture of how Aerials and Satellites operated and test the assertions the firm had made.
- b) ITV argued that Aerials and Satellites was not treated unfairly and that the business was given an appropriate and timely opportunity to respond. Specifically, it noted that:
  - i) Mr John Barnes and Mr Paul Barnes (the joint owners of the business) had never responded to correspondence from Granada Television in the past but rather that Mr Clarke had always corresponded with Granada. ITV added that given Mr Clarke’s role as customer service manager, it was reasonable for the programme makers to suppose that their questions were within his remit. ITV stated that no one at Aerials and Satellites seemed to accept direct responsibility for the supervision of engineers. It said that on this occasion, the owners of the business had again not responded to Granada’s letter setting out the allegations which would be made in the programme. ITV said that after

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<sup>3</sup> The Ofcom Broadcasting Code defines ‘doorstepping’ as “the filming or recording of an interview or attempted interview with someone, or announcing that a call is being filmed or recorded for broadcast purposes, without any prior warning.”



three weeks without a response, and in light of its previous experience of Aerials and Satellites, the programme makers decided to attempt an interview without prior warning. The broadcaster stated that it was only in the evening of 20 March 2007, after the production team had left the office to stay overnight in Lingfield (where Aerials and Satellites were based) that Mr Clarke's email acknowledgment of Granada's letter was sent. ITV indicated that the email did not "inform the programme makers of the situation", as claimed by the complainant, but said only that Aerials and Satellites "would be responding in the near future". ITV also said that unfortunately, even this limited amount of information was not available to the production team, because it did not receive the email until it returned to the office after the interview had been concluded.

- ii) ITV asserted that Aerials and Satellites' written statement in response to the allegations (which was supplied after the production team had visited the company's headquarters but prior to the broadcast) was not unfairly edited and that the complainant's position was fairly reflected in the programme. It argued that there was no requirement on broadcasters to comply with an organisation's request to control or deliver its statement.
- c) ITV argued that the use of surreptitious filming of Aerials and Satellites staff was justified. It said that the office staff were filmed as part of the gathering of further material evidence because they had detailed knowledge of how the business was run. ITV also argued that they were asked questions within their knowledge. ITV noted that one of the people filmed dealt with customer complaints and was therefore in a position to know how the management dealt with inquiries regarding Mr Marshall and why the management should have been aware that he (i.e. Mr Marshall) "*robs grannies*". ITV stated that, as customer service manager, Mr Clarke had considerable knowledge of the workings of the business, particularly in the area of specific interest to *House of Horrors*, namely, customer service. It also argued that in the past, Mr Clarke had not considered such issues to be outside his remit and noted that in fact, he had previously sought recordings of *House of Horrors* material in order that "appropriate action" could be taken against Aerials and Satellites' engineers. In relation to the film crew's unannounced visit, ITV argued that the purpose of the filming was clear to Mr Clarke. It noted that he had not contended, within the complaint, that by 21 March 2007 (the date of this visit) he was unaware of Granada's renewed interest in Aerials and Satellites or the issues which it raised. ITV said that Mr Clarke was asked to respond to questions by Mr Maitland and that he did so, both on camera and, later on, on the telephone. ITV suggested that Mr Clarke's response could be paraphrased as: "If the customer is foolish enough to accept the first quote then more fool the customer". The broadcaster said that this echoed the position Mr Clarke had taken in conversation with the undercover reporter.
- d) ITV responded to the complaint of the omission of some specific footage of one of Aerials and Satellites engineers. The broadcaster said that this footage showed the engineer attending a *House of Horrors* property in which a simple aerial fault had been set up by an independent specialist aerials engineer. The footage showed the engineer carrying out unnecessary work, misinforming an actor posing as the householder about the problem and overcharging for the work carried out. ITV said that although it had intended to include this footage an editorial decision was taken to exclude it because of time constraints on the length of the programme. This editorial decision did not result in any unfairness to Aerials and Satellites.

In summary the broadcaster responded to the complaint of unwarranted infringement of privacy in both the making and the broadcast made by Aerials and Satellites, Mr Clarke, Mr Ingrams and Mr Scott as follows:

- e) The broadcaster argued that the production team's unannounced visit to Aerials and Satellites was reasonable and proportionate in the context of trying to obtain a meaningful response from Aerials and Satellites. In relation to the specific points raised under this head of complaint ITV made the following comments:
  - i) With regard to the complaint that it had not sought to gain access to the complainant via an invitation, ITV noted that a member of the production team telephoned Aerials and Satellites twice on the morning of 21 March 2007 to speak to Mr Clarke with the intention of asking him for an interview but was told he was not in the office. However, the team had witnessed Mr Clarke arriving there at 0900. ITV stated that Granada's undercover reporter had established previously that complaining customers could not gain access to Aerials and Satellites' head office (the doorbell was not answered and the door was not opened). The broadcaster also stated that on one occasion the reporter had witnessed staff concealing themselves from, and refusing to speak to, a woman who had come to ask for her money back. She was left on the doorstep. ITV argued that in this context, and having been told that Mr Clarke was not on the premises when it was apparent that he was, the programme makers decided to enter through a rear entrance to the property which was unobstructed. ITV stated that as soon as the programme makers were asked to leave the premises they tried to do so, although it acknowledged that Mr Maitland was still asking questions as he left. The broadcaster said that, as the team tried to leave, members of Aerials and Satellites' staff had attacked the camera by trying to pull it off the shoulder of the cameraman and had also tried to disconnect the sound mixer. ITV said that, aside from the value of the equipment which was being attacked, it was also heavy and bulky and the programme makers were conscious of safety risks. ITV also said that in the aggressive confusion the programme makers were given mixed messages about which exit they should use. For these reasons (and notably because they were hampered by Mr Ingrams and Mr Scott) the team's departure was slow.
  - ii) In response to the complaint that the owners of the business had not been given sufficient time to respond to the producer's request for an interview, ITV said that Granada had sought a pre-arranged interview but received no response. Three weeks was ample time for some form of response by a party acting in good faith with the intention of giving proper consideration to the question of an interview. ITV said that the programme makers' experience of Aerials and Satellites was extensive, that it had featured in *House of Horrors* on three previous occasions and, that on each occasion, many of the business' actions and responses could be construed as having been aimed primarily at frustrating the programme makers' enquiries. ITV said that whatever its assurances to the contrary, Aerials and Satellites was prepared to continue to employ rogue engineers (even when the conduct of such an engineer warranted prosecution), declined to deploy a code of conduct and chose to have no price list. ITV also noted that the undercover engineer it had sent in was assigned to work alongside a rigger selected at random by Aerials and Satellites and that having said that he ripped people off, this rigger had also volunteered the following comment: "*Plus, I like it.*".

- iii) ITV argued that the public interest in seeing the footage of Aerials and Satellites' operations and attitudes outweighed the reasonable rights to privacy of the business' office staff.
- iv) ITV did not accept that it would have been possible to secure the footage recorded during the film crew's unannounced visit (and subsequently broadcast) by way of a pre-arranged interview. ITV's position on this was based on Granada's previous experience of Aerials and Satellites and on its failure in this instance to provide any response to the producer's request for an interview in the three weeks which elapsed between the date on which this request was sent and the date of the production team's unannounced visit.

### **Aerials and Satellites' comments in response to ITV's statement**

In summary, Aerials and Satellites responded to ITV's statement as follows (it did not make any additional points in relation to heads b), d), e) iii) and e) iv) of the complaint):

- a) The complainant first addressed ITV's response to the complaint that the tone of the programme and the use of speculation by Aerials and Satellites' staff which was recorded surreptitiously was unfair. Specifically, it stated that applicants for aerial installation engineer positions at Aerials and Satellites were assessed over a three to four day period and that successful applicants were offered a permanent position and contract of employment in addition to agreeing to abide by the company's code of practice.
- c) Aerials and Satellites said that the surreptitiously filmed footage used in the programme did not establish an accurate picture of how it operated. Rather, it argued that the footage served to highlight the actions of a minority of employees while suggesting that it was representative of the majority.

The complainant said that while Mr Clarke might have considerable knowledge of the business, he was not responsible for the recruitment, discipline or day-to-day supervision of the aerial installers. It also noted that the undercover telephonist spent two weeks at Aerials and Satellites' offices without uncovering any evidence that anyone who held a management position was advising installation engineers to make jobs up, invent prices, depart from the price guide at will, overcharge or deliver incompetent work.

- e) Aerials and Satellites made the following comments in relation to ITV's response to its complaint that its privacy (and that of three of its staff) had been unwarrantably infringed in the making and the broadcast of the programme as a result of the film crew's unannounced visit.

Aerials and Satellites said that the film crew had entered its premises by a rear entrance past a clearly visible sign that stated "NO UNAUTHORISED PERSONS ALLOWED BEYOND THIS POINT". It stated that the film crew were asked to stop filming and leave the premises repeatedly by Mr Scott, Mr Ingrams and Ms Julie Barnes. However, the crew took about three minutes to leave the premises, during which time it tried to access another area of Aerials and Satellites' offices. Aerials and Satellites argued that if the production team had stopped filming when requested to do so the commotion that followed would not have occurred.

In relation to ITV's specific response to the complaints at heads e) i) and ii) Aerials and Satellites made the following comments:

- i) It said that Mr Clarke had arrived at Aerials and Satellites' offices between 0730 and 0745 am on 21 March 2007, not at 0900 as ITV had stated. He had been absent from Aerials and Satellites' offices between approximately 0930 and 1000, having attended a local Land Rover dealership. Aerials and Satellites stated that Mr Clarke was not informed of the film crew's alleged telephone calls on 21 March 2007 and argued that the programme did not show evidence of these calls having been made to Aerials and Satellites prior to the film crew's visit to company's offices.

Aerials and Satellites denied that customers visiting its premises were denied access at any time. It said that all callers were greeted and seated in a waiting area and added that both the undercover telephonist and the undercover engineer had gained access to Aerials and Satellites' premises upon their initial arrival via the front door having been greeted first.

- ii) Aerials and Satellites stated that it had not considered it necessary to provide a full response to the initial letter from the producer by 21 March 2007 because the programme was scheduled to be broadcast some four months after the date of this letter.

#### ITV's second statement in response to the complaint

In summary ITV responded to the complainant's comments as follows (like Aerials and Satellites the broadcaster did not make any additional points in relation to heads b), d), e) iii) and e) iv) of the complaint):

- a) ITV indicated that the experience of the undercover aerial fitter it had sent to work at Aerials and Satellites did not match the description of the recruitment assessment process described by the complainant in its second submission. The broadcaster stated that the fitter was given a 10-minute practical test and that no references were sought before he was put to work. It added that he had found out that fitters at Aerials and Satellites were given a basic salary of £300 for a 60-hour week and that they were paid on a commission basis for sales over £1800 a week. It also said that he had found out that fitters would be dismissed after three months if they did not achieve weekly sales of £2500. ITV also noted that the fitter was not given a "Code of Practice".
- c) ITV denied that the surreptitiously filmed material gave a false impression of how Aerials and Satellites operated. It noted that after the broadcast it had received emails from more dissatisfied customers and from former employees who said that the "management encouraged fitters to rip people off". The broadcaster described the three previous occasions when Granada had investigated Aerials and Satellites and argued that on this, the fourth occasion, its undercover fitter had given a clear picture of how the business was run. ITV quoted from the comments made by Mr Tony Haig (the Aerials and Satellites employee with whom the undercover fitter was sent out) and included in the programme to support its position. ITV argued that given that Aerials and Satellites chose to place a new recruit (i.e. the undercover fitter) with Mr Haig it was reasonable for it to have inferred that his actions reflected the company's policies.

In relation to Mr Clarke's remit, ITV noted that its undercover recruits did not meet anyone who appeared to have responsibility for the supervision of the aerial installers. However, it said that Mr Clarke was the customer services manager and was the person to whom it had been referred on previous occasions.

ITV argued that its undercover telephonist had found evidence that the other telephonists believed that Aerials and Satellites' management turned a blind eye to a "rip off culture". It quoted from conversations the undercover telephonist had had with another telephonist and with Mr Clarke to illustrate its point. ITV also suggested that its position on this issue was supported by the fact that Aerials and Satellites continued to employ Mr Marshall despite Surrey Trading Standards Office's successful prosecution of him in 2004.

- e) ITV made the following points in relation to Aerials and Satellites' response to its comments regarding the complaint about unwarranted infringement of privacy (in the making and the broadcast of the programme) as a result of the film crew's unannounced visit.

The broadcaster indicated that when asked to leave Aerials and Satellites' office, the production team agreed to do so. ITV said that the team slowly backed out of the room. However, it was difficult for it to leave swiftly while ensuring the equipment was not damaged and people were not hurt because of the congestion and because Aerials and Satellites' employees were trying to pull the camera away from the cameraman. ITV denied that the crew tried to enter another part of the office. The broadcaster said that rather the crew was trying to leave the way it had come but was told to leave by the front door which it then did. ITV argued that the crew had carried on filming because Ms Barnes had appeared to want to carry on a conversation but that as soon as she said she did not want to be filmed recording was stopped. ITV indicated that it was not the crew but the Aerials and Satellites employees who had caused the commotion by trying to physically restrain the crew and interfere with the equipment. The broadcaster added that the untransmitted footage of this meeting, which it had provided to Ofcom, proved its case.

- i) ITV indicated that the film crew was on site from 0645 and did not see anyone fitting Mr Clarke's descriptions arrive until 0900. The broadcaster said that having been informed of Aerials and Satellites' statement that Mr Clarke was not in the building between 0930 and 1030 am on the 21 March 2007, the crew said that it assumed he must have left from the front of the property. With regard to the claim that Mr Clarke knew of its presence on the day, the crew indicated that it had not identified itself to Mr Clarke, but rather that it had called to see if he was available to speak. ITV accepted that the programme as broadcast did not show these calls but argued that this did not result in unfairness to Aerials and Satellites.

ITV also argued that the evidence gathered by its undercover receptionist and undercover fitter indicated that it was very difficult to gain access to Aerials and Satellites' office through the front door.

- ii) ITV argued that three weeks from the date on which the letter noting its allegations about Aerials and Satellites was sent was ample time to allow for a response. It said that it had made further phone calls to Mr Clarke and that when no response came it decided to make an unannounced visit. ITV argued that in these circumstances, and bearing in mind its previous experience of the company, this was justified.

## 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 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.

The case was considered by Ofcom's Executive Fairness Group. In reaching its decision, the Group considered a recording of the programme, a recording of untransmitted footage of the film crew's unannounced visit to Aerials and Satellites' offices, transcripts of both these recordings, and each party's written submissions (including the pre-transmission correspondence between the complainant and the broadcaster).

- a) Ofcom first considered Aerials and Satellites' complaint that the tone of the programme was unfair because it was unnecessarily dramatic and included unfair criticism of, and unfounded and derogatory remarks about, the company, including unfair speculation based on material gained through surreptitious filming. The issue of whether the use of surreptitiously filmed material in the programme as broadcast resulted in unfairness is considered in the Decision at head c) below.

Ofcom considered this complaint in light of the requirement on broadcasters in Rule 7.1 of the Code to avoid unjust or unfair treatment of individuals or organisations in programmes.

Ofcom also took particular account of Practice 7.9 of the Code which states that before broadcasting a factual programme broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom looked at the transcript and recording of the programme in its entirety. It noted that several critical comments were made about Aerials and Satellites and/or its engineers by the presenter, Jonathan Maitland, an engineer who formerly worked for Aerials and Satellites, an undercover aerial installer ("Jim") and an independent aerials expert (Mr Kevin Dawson).

Ofcom's role was not to establish conclusively from the broadcast programme, or the submissions and supporting material, whether Aerials and Satellites' engineers systematically 'ripped off' the company's customers with the tacit approval of the management, but rather to address itself to the issue of whether the programme makers took reasonable care in relation to material facts.

Ofcom noted that in the programme the former employee indicated that the Aerials and Satellites was unscrupulous and overcharged customers. It also noted that Mr Haig, one of Aerials and Satellites' engineers, admitted that he '*ripped off*' customers and advised the undercover fitter, Jim, to:

*“Try to get what you can, you know what I mean? At the end of the day it’s commission driven – they [i.e. the management] want you to earn as much as you can. That’s what they’re interested in to be perfectly honest with you.”*

Ofcom also observed that Mr Haig had alleged that Mr Marshall (a fellow Aerials and Satellite’s engineer) was *“terrible for ripping people off”* and specifically targeted *“grannies”*. In addition, Ofcom recognised that the independent aerials expert had indicated in the programme that that during his visit to the *House of Horrors* property Mr Marshall had unnecessarily replaced the old amplifier and had damaged it by hitting it with a hammer.

It also noted that at the end of this visit the presenter had said: *“75 quid for a call out that’s just wrong”*. The expert had responded:

*“Moreover they’re putting it on top of the end bill. And £295 pounds to supply and fit an amplifier, which to be quite frank would cost you no more than 40 or 50 pounds in one of the big DIY stores, it’s downright scandalous.”*

Ofcom considered that this was a clear indication that the independent aerials expert believed that the ‘householder’ had been overcharged.

Ofcom also considered that the comments made to “Sarah”, the undercover telephonist, by the office staff indicated that Aerials and Satellites’ employees who regularly dealt with both billing and customers’ complaints believed that at least some of the engineers (notably, Mr Rob South, also known as Rob Marshall) deliberately charged inflated prices. It also considered that these comments indicated that the management not only knew about this practice but continued to employ these engineers because of the amount of money they brought in to the business.

In addition, Ofcom noted that when Sarah asked Mr Clarke, the customer services manager, about Rob’s practice of overcharging he said:

*“Well, if people are foolish enough to accept a quote that he gives them. See at the end of the day people don’t help themselves. Rob goes in or an engineer goes in and says it’ll be this much, do you want it or not, yes we’ll have it.”*

It also noted that when Sarah then asked: *“But do you think he does rip people off or is that...?”* Mr Clarke responded:

*“He goes in at a high price definitely...A lot of engineers will set their own rates when pricing jobs...So you know, more fool the customer if they want to accept that price then they can’t then come back and say that they’ve paid too much.”*

Ofcom considered that this conversation would have made it clear to viewers that the management, represented by Mr Clarke, was aware of the high prices charged by at least one of its engineers and believed that it was up to the customer to look out for their own interests.

Ofcom took into account the testimony of the former employee, the actions and comments of the Aerials and Satellites engineers (as shown in the programme), the information gathered by the undercover fitter, the advice of the independent expert, and the comments made by the office staff and Mr Clarke within the footage filmed surreptitiously. It concluded that it was not unfair to Aerials and Satellites for the programme to include comments which amounted to allegations of bad practice.

Ofcom then went on to consider whether the complainant had been treated unfairly with regard to the inclusion of the following comment by the presenter after he had watched some of the footage of Mr Haig:

*“But this is like the modern equivalent of the highwaymen in, in the, you know, in the nineteenth century with masks and on the back of horses”.*

Ofcom recognised that in making this comment, which likened Mr Haig’s actions to those of a nineteenth century highwayman, Mr Maitland had used somewhat irreverent language. However, it also recognised that he was often irreverent when commenting on the actions of traders featured in the programme. Ofcom also observed that this comment was made immediately after Mr Haig was shown describing how he ‘ripped off’ customers and that later on in the same sequence Mr Haig admitted that he liked doing so.

In light of this context and the established nature of Mr Maitland’s style, Ofcom considered that viewers would have understood the implication of this comment namely, that the programme was alleging that Mr Haig was unfairly overcharging customers, and not taken it to have been an allegation that he robbed people with the threat, or actual application, of violence.

Given the factors noted above Ofcom considered that the programme presented the actions of Aerials and Satellites fairly and that these actions, as discussed above, justified the allegations made about the company in the programme. Ofcom also considered that the specific comparison of the actions of one of its engineers with a nineteenth century highwaymen would not have resulted in unfairness to Aerials and Satellites.

Ofcom therefore found no unfairness to Aerials and Satellites in this respect.

- b) Ofcom then considered the complaint that the programme failed to provide Aerials and Satellites with an appropriate and timely opportunity to respond to the allegations made about it.

As well as considering this complaint in light of Rule 7.1 and Practice 7.9 of the Code (see the Decision at head a) above), Ofcom took particular account of the following Practices of the Code set out under the sub-heads below:

- i) It considered the complaint that it was unfair for the reporter and film crew to have made an unannounced visit to Aerials and Satellites’ head office when Mr John Barnes (one of the owners of Aerials and Satellites) was in the process of obtaining legal advice about how best to respond the programme maker’s request for an interview.

In addition to Rule 7.9 and Practice 7.9 of the Code, Ofcom also took particular account Practice 7.11 which states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

At this head Ofcom considered only the complaint of unfairness in relation to an opportunity to respond. The issue of whether the unannounced visit resulted in an unwarranted infringement of the complainant’s privacy in the making and/or broadcast programme is considered in the Decision at head e) below.



As noted in the Decision at head a) above, Ofcom considered that the programme included significant allegations about the quality of the service provided by Aerials and Satellites. Therefore, Ofcom considered that it was incumbent upon the broadcaster to offer Aerials and Satellites an opportunity to respond to these allegations.

Ofcom noted that Aerials and Satellites was invited to respond to the allegations via a letter sent to Mr John Barnes at Aerials and Satellites' head office by Ms Sarah Caplin, the Executive Producer of *House of Horrors*, on 26 February 2007. It observed that this letter, which was sent three months prior to the broadcast of the programme, set out the material which the programme maker had gathered in detail. It also noted that it included an invitation to take part in a pre-recorded interview which would cover eight specific issues that encompassed the allegations which would be made against the company in the programme.

Ofcom recognised that Mr Clarke had emailed the programme maker at 1736 on Tuesday 20 March 2007 and that in this email he had said the following:

“We acknowledge receipt of Ms Caplin’s letter addressed to Mr J Barnes dated February 26<sup>th</sup> 2007 and will be responding in the near future”.

Ofcom observed that on the evidence available to it Mr Clarke’s email, sent three weeks after Ms Caplin’s letter, was Aerials and Satellites’ first response to the allegations. Ofcom also observed that the email was sent after the end of normal business hours on the day on which the programme’s reporter and film crew had travelled to the location of the company’s head office in order to attempt to secure a response to its allegations by means of an unannounced visit. The email was therefore not received before this visit was made.

Ofcom noted that in its statements in response to the complaint ITV had said that a member of the production team had called Aerials and Satellites’ office twice on the morning of 21 March 2007 (before the unannounced visit was made), without identifying him or herself, in order “to establish whether Mr Clarke was available to speak”.

In light of the above considerations Ofcom considered that Ms Caplin’s letter of 26 February 2007 represented an appropriate and timely opportunity to respond to the allegations being made about Aerials and Satellites. In addition, given the lack of a response by Aerials and Satellites in the three weeks after Ms Caplin sent this letter, Ofcom considered that the use of footage filmed during the film crew’s unannounced visit to the company’s offices (which showed the presenter asking Mr Clarke why the company was “*still ripping people off?*” and then being asked to leave the premises) was justified and did not result in unfairness to Aerials and Satellites in the programme as broadcast.

- ii) Ofcom then considered the complaint that the programme maker unfairly ignored Aerials and Satellites’ request for it to read out a short (10 to 15 second) statement as part of the programme and instead edited this statement in a way which did not provide a fair representation of the company’s position.

Ofcom noted that that the editing of material is a matter of editorial judgement for the broadcaster and that having given Aerials and Satellites an opportunity

to respond the broadcaster was required to ensure that its “contributions should be represented fairly” (as set out in Practice 7.6 of the Code).

As noted in head b) i) above, Ofcom recognised that in its letter to Aerials and Satellites (dated 26 February 2007) the broadcaster had offered Aerials and Satellites an opportunity to respond to the allegations about the company which it planned to broadcast by way of a pre-recorded interview. However, Ofcom noted that in its email of 20 March 2007 Aerials and Satellites did not indicate that it had any interest in taking up this offer and that in the letter sent on its behalf by Irwin Mitchell to Ms Caplin on 3 April 2007 it declined the offer outright.

On 3 April 2007 Irwin Mitchell had written to Ms Caplin with a full response to the allegations set out in her letter to Aerials and Satellites of 26 February 2007. Further, Ofcom noted that on 2 April 2007 Mr Rob Marshall wrote to Ms Caplin in response to the specific allegations made against him.

In addition, Ofcom recognised that in the letter of 3 April 2007 the complainant had asked for a specific statement to be included in the programme. However, Ofcom noted that it was not incumbent on ITV to offer Aerials and Satellites either a pre-recorded interview or to include a specific statement in the programme but rather to offer an appropriate and timely opportunity to respond to its allegations and to represent that response fairly.

Having concluded that Aerials and Satellites was given an appropriate and timely opportunity to respond to the broadcaster’s allegations Ofcom then considered the key allegations made about Aerials and Satellites in the programme and whether the company’s response to them was represented fairly.

Ofcom noted that the key allegations made against Aerials and Satellites in the programme were that some of its engineers provided a poor quality service, that they systematically over-charged customers for the work carried out (with the tacit approval of the management) and that one of its engineers (Mr Rob Marshall aka Rob South) specifically targeted elderly customers to overcharge.

Ofcom observed that Aerials and Satellites’ response to the allegations made several points relating to the operation of the company as opposed to specific engineers or jobs. These included an explanation that Aerials and Satellites instructed its engineers to comply with its Code of Practice, that while it “endeavours to provide a quality service at a fair price” as a sustainable business it has relatively high overheads. It also stated that “all employed engineers receive a steady stream of work and the targets are not onerous and are regularly achieved by the majority of engineers each week” and that a “variation in prices to reflect structural factors [for example gaining access to the roof of taller buildings] is ethical and fair to customers”.

In relation to the engineers against whom specific allegations were made in the programme, Aerials and Satellites said that “comments made by Tony Haig were ill considered but essentially off the cuff” and that he was a “reliable and hardworking engineer”. Aerials and Satellites acknowledged that Mr Marshall had been convicted of a Trading Standards offence in 2004 for conduct which it did not condone and said that it would investigate his actions in relation to the work he carried out at the *House of Horrors* property.

Ofcom also noted that in his own letter to the broadcaster Mr Marshall said that comments attributed to him by other staff members were unjust and that the allegations made against him were unfounded. He stated that he was a “good, competent aerials and satellites installer”, that he carried out work to “a high standard”, that “the monetary value of a job never differs because of a customer’s age” and that he doesn’t “commence any work until a price has been negotiated” but that “sometimes the price is only verbally quoted, which on a few occasions has led to confusion of the total cost”. He closed his letter by saying that the company had started disciplinary proceedings against him which he thought was unfair but that he accepted that he had a duty to the company and customers to provide “an honest quality service” and he promised to “adhere to the all Codes of Practice where previously I may have not”.

Having considered these responses to the broadcaster’s allegations Ofcom looked at how they were reflected in the programme.

Ofcom observed that the programme included Mr Clarke’s response to questions put to him by Mr Maitland during a telephone call which he made to the presenter an hour after the film crew’s unannounced visit to Aerials and Satellites’ head office. The programme included Mr Clarke responding to questions about Aerials and Satellites’ employment of Mr Marshall. In particular, Ofcom noted that it showed Mr Clarke explaining that his comment to the undercover receptionist about customers being “foolish enough to accept a quote that he [Mr Marshall] gives them” was taken out of context.

Ofcom also noted that having included Mr Clarke saying:

*“I don’t think that they [the customers] are fools, my point is yes we do charge a higher price than a lot of our competitors. It’s then down to accept that quote or shop around”.*

The presenter then concluded the report in the following way:

*“In other words they charge as much as they can and if the customer falls for it well that’s their tough luck. So before you even think about calling Aerials and Satellites make sure you have shopped around, like Ian Clarke says, and then you needn’t call them at all.”*

*“Aerials and Satellites have now written us a formal letter to say financial targets they set for engineers are realistic and achievable. The management is committed to improving customer satisfaction and eliminating rogue engineers so they’ve started disciplinary proceedings against Rob Marshall. But Rob Marshall says he disputes what the girls in the office said about him and that he doesn’t charge grannies any more than anyone else. He says he’s sorry he caused us unnecessary expense and from now on he’s going to follow the Aerials and Satellites’ Code of Practice – whatever that means!”.*

In Ofcom’s view these comments included a fair reflection of the responses to the key allegations made about the company in the programme. They included the pertinent points made in both Irwin Mitchell’s and Mr Marshall’s letters to the programme maker as well as Mr Clarke’s explanation of the comment he made about customers’ acceptance of price quotes from Aerials and Satellites’ engineers which was made during a surreptitiously filmed conversation with the undercover receptionist.

In light of the evidence above in relation to heads b) i) and ii) of this complaint, Ofcom found that that Aerials and Satellites was given an appropriate and timely opportunity to respond to the allegations made against it in the programme and that its response to these allegations was fairly represented.

- c) Ofcom considered Aerials and Satellites' complaint that the programme unfairly and disproportionately targeted certain members of staff without their knowledge or consent through surreptitious filming. Aerials and Satellites said that Mr Clarke was repeatedly asked questions about the supervision of engineers despite having explained that this area was outside his remit. Aerials and Satellites also complained that at no point was Mr Clarke provided with a clear explanation of the purpose of the filming; told how the footage would be used; or given an opportunity to preview the programme or the specific footage.

With regard to this complaint Ofcom took particular account of Practice 7.9 as well as Practice 7.14 of the Code which states that broadcasters or programme makers should not normally obtain or seek information, audio, pictures or an agreement to contribute through misrepresentation or deception. (Deception includes surreptitious filming or recording). However, it may be warranted to use material obtained through misrepresentation or deception without consent if it is in the public interest and cannot reasonably be obtained by other means.

Ofcom observed that the programme explained to viewers that *House of Horrors* had previous experience of Aerials and Satellites' engineers providing sub-standard service and overcharging for their work. It recognised that the report included the testimony of a former Aerials and Satellites employee (who had voluntarily contacted the programme maker) alleging that the management encouraged its engineers to over-charge its customers. In addition, Ofcom recognised that in reference to one of Aerials and Satellites' engineers the presenter had said that:

*"One of their most notorious fitters is Rob Marshall or Rob South as he's sometimes known. He was prosecuted by Surrey Trading Standards in 2004 – but despite that he's still working for the firm".*

Taking these factors into account, Ofcom considered that there was a public interest in the broadcaster having obtained and then broadcast surreptitiously filmed footage in order to enable viewers to assess the service provided by Aerials and Satellites and find out why the management continued to employ engineers who appeared to offer a poor quality service and over-charge for doing so and that this material could not have been obtained by any other means.

With regard to the complaint that Mr Clarke was not informed about the purpose of this filming, Ofcom observed that the nature of surreptitious filming would preclude such an explanation being given.

Ofcom then turned to the complaint that it was unfair for the programme to have asked Mr Clarke questions about the supervision of Aerials and Satellites' engineers

Ofcom noted that Mr Clarke was Aerials and Satellite's Customer Services Manager. He was the individual who sent the email acknowledgement to Granada on 20 March 2007 in response to the Executive Producer's letter. Ofcom recognised that within its first statement ITV had said that Mr Clarke had corresponded with the programme maker in relation to its previous investigations into the company. Aerials and Satellites had not denied this within its comments on ITV's statement.

While Ofcom acknowledged Aerials and Satellites' submission that "Mr Clarke was not responsible for the recruitment, discipline and day to day supervision of aerials installers", it considered that the actions of the engineers shown in the programme would have had a direct impact on the customers for whom Mr Clarke had responsibility. It also noted that when the undercover receptionist asked him a question about the high prices Mr Marshall allegedly charged customers, Mr Clarke had responded directly rather than saying that he could not comment on this subject. Ofcom noted that, as shown in the programme, it was only during the film crew's unannounced visit that Mr Clarke responded to a question on this subject by saying "OK first of all it's not my department, OK".

Ofcom considered that, in light of the correspondence between the programme maker and Mr Clarke in relation to an earlier programme and its position that the actions of the engineers employed by Aerials and Satellites had a direct impact on the customers for whom Mr Clarke had responsibility, it was not unreasonable for the undercover reporter to have asked him questions about the prices charged by those engineers and to have broadcast Mr Clarke's responses.

Ofcom observed that the programme also included footage of Mr Clarke being questioned by the presenter during the film crew's unannounced visit. Specifically, he was asked why the company continued to employ engineers who overcharged customers. The unannounced visit is considered in more detail in the privacy complaint at head e) below. However, Ofcom considered that given Mr Clarke's previous contact with the *House of Horrors* programme and given that he was the person who sent the email acknowledgement in response to Ms Caplin's letter of 26 February 2007, he would have had a sufficiently clear understanding of the nature and purpose of the programme to have responded to the questions put to him by the presenter during this visit. Therefore the inclusion of this footage did not result in unfairness to the company.

Given the factors noted above, Ofcom found that the inclusion of the footage of Mr Clarke responding to questions about the company's engineers, during the surreptitiously filmed sequences and the film crew's unannounced visit did not result in unfairness to Aerials and Satellites.

- d) Ofcom next considered the complaint that the programme unfairly omitted footage, which Aerials and Satellites said showed one of its engineers attending a *House of Horrors* property and providing a "reasonably priced and professional service", and thereby presented an unbalanced and misrepresentative picture of the company.

As with head a) above, Ofcom took particular account of Practice 7.9 of the Code in relation to this complaint.

Ofcom noted that in its first statement in response to the complaint ITV said that the footage in question showed an Aerials and Satellites engineer attempting to fix a fault that had been deliberately created by an independent aerials expert. Ofcom also noted that ITV said that the footage showed the engineer carrying out unnecessary work, giving the 'householder' incorrect information and over-charging for the work.

Ofcom recognised that the complaint and the broadcaster had different views regarding the content of the omitted footage. However, Ofcom observed that its role was not to determine the nature of the omitted footage but to address itself to the issue of whether the programme maker took reasonable care in relation to material

facts by assessing whether the programme as broadcast resulted in unfairness to Aerials and Satellites.

Programme makers can quite legitimately select, omit or edit material gathered for inclusion in a programme as long as this does not result in unfairness. This is rightly an editorial decision for programme makers to take. Therefore, Ofcom was not concerned with the nature, number or length of the different sections of footage which featured Aerials and Satellites' engineers but with whether the footage of them which was included in the programme resulted in unfairness.

In light of this Ofcom recognised that, as noted in the Decisions at heads a), b) and c) above, it had found that in the wider context of the programme (notably, the advice of the independent aerials expert and the fairly represented response from Aerials and Satellites to the allegations made against it) the actions of the engineers as broadcast did not result in unfairness to Aerials and Satellites.

Given its findings that the programme as broadcast had not represented Aerials and Satellites unfairly, Ofcom considered that in choosing to omit footage of one of Aerials and Satellites engineers the broadcaster had acted within the reasonable limits of its editorial independence and had not misrepresented Aerials and Satellites. Ofcom therefore found that Aerials and Satellites had not been treated unfairly in this respect.

- e) Ofcom then addressed the complaint of unwarranted infringement of privacy in both the making and broadcast of the programme due to the film crew's unannounced visit to Aerials and Satellites' head office. It noted that this complaint was made on behalf of Aerials and Satellites itself and three members of its staff, Mr Clarke, the Customer Service Manager, Mr Ingrams, the Engineering Manager, and Mr Scott, the firm's Accountant.

Ofcom looked at the specific concerns raised in relation to this head of complaint (namely, that the programme maker made no attempt to gain an interview by invitation, did not give sufficient time to the complainants to respond to its allegations and filmed and broadcast footage of the visit which was not in the public interest) within its wider consideration of whether the complainants' privacy had been unwarrantably infringed in either the making and/or the broadcast of the programme, rather than addressing them individually.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy, Ofcom will therefore, where necessary, address itself to two distinct questions: First, has there been an infringement of privacy? Second, if there was an infringement of privacy was the infringement warranted?

Ofcom took particular account of the obligation within the Code which states that "any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted" (Rule 8.1). The Code also explains that an individual's "legitimate expectation of privacy will vary according to the place and nature of the information, activity or condition in question".

In considering the complaint of unwarranted infringement of privacy in the making of the programme as it related to the unannounced visit, Ofcom took particular account of Practice 8.11 of the Code which states that "doorstepping for factual programmes should not take place unless a request for an interview has been refused or it has not

been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep”.

In Section 8 of the Code “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. 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.

In reaching a decision about whether the complainants’ privacy was infringed in the making of the programme, Ofcom sought first to establish whether the company and/or the three members of staff who brought this complaint had a legitimate expectation of privacy.

Ofcom recognised that a company could have a legitimate expectation of privacy in relation to activities of a private nature which need protection from unwarranted intrusion (for example exchanges which took place in the confines of a closed board meeting or correspondence which could justifiably be regarded as private). Ofcom assessed whether Aerials and Satellites had such an expectation in the specific circumstances of this case. Ofcom considered that Aerials and Satellites’ expectation of privacy was heightened by several factors. These included the fact that the footage filmed was of staff carrying out tasks which would not normally be seen by members of the public (i.e. accounts, administration and management functions) as opposed to public-facing activities (for example, tradesmen providing a service to members of the public or sales assistants serving customers in a shop), the fact that filming took place during an unannounced visit for which no invitation had been issued and that it was undertaken in an office to which the public would not have had access. In these circumstances Ofcom considered that Aerials and Satellites had a legitimate expectation that its privacy would not be infringed.

Ofcom noted that the individual members of staff on behalf of whom this complaint was also brought may have had an expectation of privacy that was specific to them and separate from that of the company for which they worked. However, in this instance it considered that in light of the fact that these three members of staff were filmed while carrying out their functions for Aerials and Satellites in the specific circumstances described above (i.e. in the office during an unannounced visit by the film crew) they had the same legitimate expectation of privacy as the company.

Having established that both Aerials and Satellites and the three staff members who brought this complaint had had a legitimate expectation of privacy in relation to the making of the programme Ofcom considered whether their privacy had been infringed. Given that the named Aerials and Satellites’ staff were filmed in the circumstances described above (i.e. in an office to which the public did not have access during an unannounced visit by the film crew), Ofcom considered that the privacy of both the company and the three staff had been infringed.

Ofcom then turned to consider whether the infringement of privacy in the making of the programme by virtue of the filming of the unannounced visit was warranted.

As noted above “doorstepping” or the filming or recording of unannounced visits or telephone calls should only be used where an interview has been refused, there is

reason to believe that an open approach will not further an investigation and it is warranted (for example by the public interest).

Ofcom observed that, on the evidence available to it (see the Decision at head b) above), Granada had tried to secure an interview with Aerials and Satellites in relation to the allegations which it planned to make about it in the programme. It also observed that the programme maker had waited three weeks without receiving any response from the company before making its unannounced visit to Aerials and Satellites' office. Ofcom considered that this was sufficient time for the company to have provided a response to this request, had it wished to do so.

In addition, Ofcom recognised that for the same reasons as those set out in the Decision at head c) in relation to the use of surreptitious filming, there was a public interest in the broadcaster making and filming this unannounced visit in order for it to find out why the management continued to employ engineers who appeared to offer a poor quality service and to over-charge for doing so. Ofcom considered that the issue of public interest as it related to the filming of this footage lay with securing the response of Aerials and Satellites staff (notably Mr Clarke) to questions about its approach to customers. This response included not only Mr Clarke's verbal response to the questions put to him by Mr Maitland but also the attempt by Mr Ingrams and Mr Scott to eject the film crew from Aerials and Satellites' office.

Taking these factors together Ofcom found that with regard to the making of the programme the infringement of Aerials and Satellites privacy (and that of the three members of staff who brought the complaint) due to filming of the unannounced visit was warranted.

Ofcom then turned to the complaint of unwarranted infringement of privacy in the programme as broadcast of the programme as it related to the unannounced visit. It took particular account of Practice 8.6 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".

As above, Ofcom first looked at whether the privacy of Aerials and Satellites and/or the three named staff members had been infringed in relation to the broadcast of the programme in these circumstances. Ofcom noted that the material broadcast was of staff carrying out tasks which would not normally be seen by members of the public (i.e. accounts, administration and management functions, that this material was recorded during an unannounced visit for which no invitation had been issued and that the footage was of an office to which the public would not have had access. In light of these factors Ofcom considered that Aerials and Satellites had a legitimate expectation of privacy in relation to the broadcast of the footage and that the company's privacy was infringed as a result of the broadcast of the surreptitiously filmed footage.

Ofcom also considered that the three members of staff who brought this complaint had a legitimate expectation of privacy and that their privacy was infringed in the broadcast of this footage. However, in reaching this conclusion Ofcom considered not only the reasons set out above but also the fact that Mr Clarke was identified (Mr Maitland was shown addressing him by name during the unannounced visit and he had been identified during a section of surreptitiously filmed footage shown earlier in the programme) and that the other two staff members (Mr Ingrams and Mr Scott) would have been identifiable to friends and associates from this same footage because their faces were shown.



Ofcom then turned to consider whether the infringement of privacy in the broadcast of the programme by virtue of the inclusion of footage of the unannounced visit was warranted. As noted above, the Code indicates that the word “warranted” in the context of justifying an infringement of privacy has a particular meaning. It means that a broadcaster must be able to demonstrate why the infringement was justified and, if the justification put forward is in the public interest, why in the particular circumstances of the case, the public interest outweighed the complainant’s right to privacy.

Ofcom considered that the inclusion of this footage of the unannounced visit was in the public interest because it enabled ITV to demonstrate to viewers the response of Aerials and Satellites (and notably its customer services manager) to the allegation that it offered a poor quality service and over-charged for doing so. Ofcom also considered that the broadcast of the footage of the two other members of staff as they tried to eject the film crew was in the public interest in that it illustrated the company’s reaction to the allegations put it during the unannounced visit. In the light of these factors Ofcom considered that the inclusion of this footage in the broadcast was warranted.

Therefore, in relation to this head of complaint about infringement of privacy in the making and the broadcast of the programme Ofcom found that, although Aerials and Satellites and the three staff members named in the complaint had a legitimate expectation of privacy and although their privacy was infringed by the recording and broadcast of the unannounced visit, these infringements were warranted by the public interest in the material which was filmed during this visit and subsequently broadcast.

**Accordingly, the complaints of unfair treatment and the complaint of unwarranted infringement of privacy in the making and broadcast were not upheld.**

## **Complaint from D R Electricals brought on its behalf by Billson and Sharp Solicitors, *House of Horrors, ITV1, 22 May 2007***

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**Summary:** Ofcom has not upheld this complaint of unfair treatment in the broadcast and unwarranted infringement of privacy in the making and broadcast of the programme.

This edition of the undercover consumer affairs programme *House of Horrors* included a report on a washing machine inspection carried out by an employee of D R Electricals. The programme makers arranged for an independent expert on the repair of washing machines to ensure that the washing machine in a house installed with hidden cameras was working. He then created a deliberate fault in the machine before watching and commenting on the actions taken by an engineer from D R Electricals who had been called in to fix it.

Ofcom found that D R Electricals was not unfairly represented because the allegations made in the programme were justified by the advice of an independent expert. The programme clearly set each trader in context. Ofcom found that the complainant was given an appropriate and timely opportunity to respond to the allegations made about it. It also found that viewers would have been able to make up their own minds about the quality of D R Electricals' service on the basis of having seen the engineer's actions. Furthermore the programme included the engineer's comments to the 'householder', a fair representation of the complainant's response to the allegations and the opinion of the independent expert.

With regard to the complaint of unwarranted infringement of privacy in the making and broadcast Ofcom found that D R Electricals did not have a legitimate expectation of privacy in respect of the footage of its engineer carrying out a public-facing activity (fixing a washing machine) which the company offers directly to the public. Therefore Ofcom found that there was no infringement of D R Electricals' privacy and it was not necessary for it to further consider whether any infringement of privacy was warranted.

### **Introduction**

On 22 May 2007, ITV1 broadcast an edition of *House of Horrors*, its undercover consumer affairs programme. The episode investigated a man offering a pest control service and a man who had claimed to be a registered gas fitter and a registered electrician. It included a report on a washing machine inspection carried out by an employee of D R Electricals on a free call-out basis. The programme maker had arranged for an expert from the Domestic Appliance Service Association ("the DASA") to inspect a washing machine (in a house where it had installed hidden cameras). Having ensured that the machine was working correctly, the expert then created a deliberate fault in the machine in order to test D R Electricals' ability to diagnose and fix faults. The DASA expert was shown saying "*this machine's in perfect working order*" and then pulling out the motor plug at the back of the washing machine. D R Electricals' engineer visited the property twice and was filmed surreptitiously on both occasions. During his first visit the engineer diagnosed the fault in the machine as a broken circuit board and recommended that the actor posing as a householder should purchase a new machine because the cost of replacing the circuit board would be too great. During his second visit the engineer delivered a new washing machine, inadvertently found and then fixed the deliberately

created fault on the old washing machine, reinstalled the old washing machine and then fitted it with a new pump.

The programme alleged, on the basis of the expert's observations of D R Electricals' engineer, Terry, that he had not inspected the machine properly and that he had carried out unnecessary repair work.

Billson and Sharp Solicitors ("Billson and Sharp") complained to Ofcom on behalf of D R Electricals that it was treated unfairly in the programme as broadcast and that its privacy was unwarrantably infringed in the making and broadcast of the programme.

## **The Complaint**

### **D R Electricals' case**

In summary, D R Electricals complained that it was treated unfairly in the programme as broadcast in that:

- a) The context of the programme was unfair because it included traders guilty of "instances of extremely bad practice, including dishonesty".
- b) The programme unfairly recommended that people should not use D R Electricals.
- c) The programme made unfair allegations about the actions of the company's engineer, Terry, and unfairly misrepresented him and as a result unfairly misrepresented the company. Specifically, D R Electricals said that:
  - i He was unfairly shown as if was "doing nothing" and "comical noises were added for effect" when he was actually waiting for the machine to empty before he could open the door.
  - ii While he did not inspect the washing machine in any detail, the programme did not reflect the fact that he made a diagnosis based on his experience.
  - iii It was unfair that the fault had been deliberately engineered because this was not a normal expectation when inspecting a washing machine.
  - iv The programme alleged that the engineer had unnecessarily recommended an overly expensive replacement machine when in fact he recommended the new machine because he felt it would be a more cost effective option than trying to repair the circuit board (which he believed had gone wrong) and because that the model would be more suitable for an older person.
  - v The programme alleged that Terry had unnecessarily fitted a new pump, that he had overcharged for doing so and that he had fitted it badly and left it in a dangerous condition. However, D R Electricals said that having discovered the actual cause of the fault and taken the old machine back, at the customer's request, he found that, on testing, the machine did not empty. When he looked inside and found two coins which he believed had damaged the pump (and thereby caused the machine not to empty), he recommended fitting a new pump. The cost of replacing the pump (£102) was not excessive and he had not fitted the pump badly nor left it in a dangerous condition as claimed in the programme.

- d) Despite the company having offered to talk to the programme maker and its washing machine repair expert, the programme did not give an appropriate or timely opportunity for the owner of D R Electricals to respond to the allegations made about its practices as a result of the surreptitious filming.

In summary, D R Electricals complained that its privacy was unwarrantably infringed in both the making and the broadcast of the programme in that:

- e) The programme was filmed surreptitiously and broadcast without the consent of D R Electricals.

### **ITV's case**

In summary ITV responded to D R Electricals' fairness complaint as follows:

- a) ITV denied that the context of the programme was unfair to D R Electricals. It said that in revealing sub-standard service from a range of traders, this edition of *House of Horrors* followed an established format. ITV argued that the inclusion of D R Electricals (both the surreptitiously filmed material and the company's response) was justified by this context.
- b) ITV said that in light of the evidence the programme's comments regarding whether to use D R Electricals were not unfair. ITV quoted the following commentary from the programme to support its position:

*"This is where D.R. Electricals are based and when we told them what Terry had done, they insisted the fault was hard to find and that Terry gave us good advice – and that getting a new washing machine would be cheaper than fixing it. They also said that Terry believed what he told us, and we weren't overcharged...Well you've seen the secret footage - who do you believe? We say steer clear of DR Electricals in case they take you to the cleaners too!"*

- c) ITV argued that the company's engineer was not misrepresented and that the programme did not include unfair allegations about him such as to result in unfairness to D R Electricals.

By way of background, ITV noted that the engineer was told by the actor posing as a householder that her washing machine had *"thumped up and down and then stopped working mid-cycle"*. The broadcaster also said that it had been advised that a competent engineer should have been able to fix the fault within 10 to 15 minutes and that the cost should have been for labour only as no parts were necessary. ITV argued that the engineer had not properly inspected the machine or correctly diagnosed the fault but had instead offered expensive and unnecessary repairs.

- i) ITV denied that it had, as set out in the original complaint, created an unfair impression that the engineer had stared out of the window doing nothing. It noted that on his first visit the engineer had turned the dial on the machine and waited for four minutes for the timer to open the door. It said that he had then closed the door and told the householder that the circuit board was broken and that, given that it would cost £200 to repair, she *"might as well"* buy a new machine. The broadcaster acknowledged that the engineer had been waiting for the machine to open. However, it noted that he had not opened his tool box, not pulled out the machine, not removed the lid or rear panel and not carried out a visual inspection or any electrical safety check of the machine.

- ii In response to the complaint that the programme had not made clear that engineer's diagnosis was based upon his experience, ITV noted that the complainant had accepted, within its complaint, that "the machine was not examined in any detail". The broadcaster asserted that actually the machine had not been examined at all. It argued that in light of this the value of the engineer's experience was questionable. It added that it was hard to see how in response to the 'householder's' question about whether he had inspected the machine the engineer could have said that he had "*eliminated everything else*" (i.e. everything other than the circuit board which he had identified as the cause of the fault).
  - iii ITV said that in the context of this programme it had not been unfair to deliberately create a fault if, as was this case in this programme, the fault fell within the scope of ordinary operating failure and therefore the expertise expected of a competent engineer.
  - iv ITV responded to the allegation that it had unfairly alleged that the engineer had unnecessarily recommended an overly expensive replacement machine. It said that a new washing machine might be a cost effective option if an expensive component (like a circuit board) had failed but that this was not the case on this occasion. It argued that because the engineer had not inspected the machine he had had little or no basis on which to conclude that a new machine would be the most cost effective solution. It also said that while the engineer might have believed that the controls on the Bosch machine, which he recommended, would have been easier for an elderly lady he did not mention this to the 'householder' at the time.
  - v ITV denied that it had unfairly alleged that the engineer had unnecessarily fitted a new pump to the old washing machine. It said that during his second visit the engineer initially unpacked the new washing machine despite having accidentally found, and subsequently fixed, the fault in the old machine. The broadcaster noted that he then reinstalled the old machine and ran a wash cycle. However, it said that having been unable to get the machine to drain, the engineer had informed the 'householder' that the pump was damaged and would need replacing. ITV said that its expert advisor had tested the pump both before and after the engineer's visit and established that it was in full working order. It argued that it had been advised that even if there had been coins in the machine, as D R Electricals had indicated within its complaint, the filter would have prevented the coins from affecting the pump. The broadcaster said that the engineer had charged £87.35 + VAT for the new pump and that the retail value for the type of universal pump he had fitted was between £20 and £30. ITV also asserted that the new pump had been badly fitted in that the wires were not fixed to the new connectors properly. It indicated that the normal movement of the washing machine could have loosened the wires thereby stopping the machine from working and creating a risk of electric shock because the cables were not insulated properly.
- d) ITV argued that the correspondence between it and the complainant demonstrated that the complainant was given an appropriate and timely opportunity to respond to the allegations made about it in the programme. It noted that D R Electricals' offer to meet the programme maker had been conditional on its being shown the untransmitted footage and that at the same time the complainant's solicitors had threatened ITV with an injunction against broadcast

and a defamation action in the event of broadcast. ITV argued that given these circumstances it was reasonable for it to have declined to meet D R Electricals.

In summary the broadcaster responded to D R Electricals' complaint of unwarranted infringement in the making and the broadcast of the programme as follows:

- e) ITV argued that the surreptitious recording of the engineer from D R Electricals had been warranted under the terms of practice 8.13 of the Code. (This states that: "surreptitious filming or recording should only be used if it is warranted".) ITV added that the infringement of D R Electricals' privacy was warranted because the public interest outweighed the right to 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 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.

The case was considered by Ofcom's Executive Fairness Group. In reaching its decision, the Group considered a recording of the programme, the programme transcript, and each party's written submissions (including the pre-transmission correspondence between the complainant and the broadcaster).

- c) Ofcom first considered D R Electricals' complaint that the context of the programme was unfair because it included traders guilty of bad practice and dishonesty. Ofcom considered this complaint in light of the requirement on broadcasters in Rule 7.1 of the Code to avoid unjust or unfair treatment of individuals or organisations in programmes.

Ofcom also took particular account of Practice 7.9 of the Code which states that before broadcasting a factual programme broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom looked at the transcript and recording of the programme in its entirety. It noted that several critical comments were made about D R Electricals and/or its engineer by either the programme's presenter (Jonathan Maitland) or the DASA expert. A number of these examples are detailed in the Decision at head c) below.

In light of the inclusion of these comments, and others of a similar nature, Ofcom considered that the report did allege that D R Electricals was guilty of bad practice. Ofcom then considered whether the engineer's actions as shown in the programme justified ITV's portrayal of D R Electricals.

Ofcom's role was not to establish conclusively from the broadcast programme or the submissions and supporting material, whether the engineer had taken the appropriate actions to fix the washing machine but rather to address itself to the issue of whether the programme makers took reasonable care in relation to material facts.

Ofcom noted that in the programme the independent expert from the DASA had observed that during his first visit to the property the engineer had not carried out an inspection of the washing machine, had incorrectly diagnosed a fault with the circuit board and had unnecessarily recommended an overly-expensive replacement machine. Ofcom also noted that the programme showed that during the engineer's second visit, the back of the washing machine fell off as he was taking it away. It also recognised that when this happened the engineer fixed the deliberately created fault within a few seconds.

Ofcom therefore considered that it was made clear to viewers that the engineer had not carried out a full inspection of the washing machine during his first visit and had thereby adversely affected the 'householder'.

Ofcom recognised that, having inadvertently found and fixed the fault, Terry had refitted the old machine, at the request of the 'householder'. However, it also noted that later in the programme the DASA expert indicated that the engineer had then unnecessarily fitted a new pump to the old machine, left it in a dangerous condition and overcharged the 'householder' for this work.

Ofcom considered that in light of the actions of the engineer, as shown in the programme, and the comments made about them by the independent expert (as detailed in the Decision at head c) below), it was not unfair to D R Electricals for the programme to include comments which amounted to allegations of bad practice and dishonesty.

Ofcom then went on to consider whether the complainant had been treated unfairly by being placed in the context of the other traders featured in this edition of the programme. The programme also featured a pest control service which had over-treated a loft with strong chemicals and a man who had formerly pretended to be a Corgi registered gas fitter and had now set up as a "registered" electrician without the registration he required by law.

Ofcom noted that, in common with previous editions of *House of Horrors*, this programme presented each case as distinct by means of a clear introduction to each trader, an explanation of the set up with the 'householder' and the results in each case. In addition, it recognised that *House of Horrors*, which was in its seventh series, had an established practice of featuring different types of traders whose actions varied in terms of the seriousness of their potential consequences.

Ofcom observed that the actions of all three traders could have damaged the health of customers. However, it also noted that the potential consequences of their actions differed in terms of their level of seriousness. It noted the way in which the programme had reflected some of these potential consequences. The programme referred to the unregistered gas fitter/electrician as

*"a gas fitter who's in danger of exterminating us";*

and the presenter was shown asking him the following questions:

*"so can you explain to us why you are committing a criminal offence?...Do you understand you've put people's lives at risk?"*

Having viewed the actions of the pest control man, the programme showed a pest-control expert saying:

*“The smoke’s an insecticide, but there’s a lot of precautions that should have been done before letting one of those off, you saw the sparks come off there and it could have caused a fire”.*

In addition, as noted above, the programme included the DASA expert talking about the cables which D R Electricals’ engineer had fitted in the washing machine in the following way:

*“They’re not insulated, which means if they come off, there is a possibility of electric shock.”*

Having assessed these comments and others made about the traders featured in the programme, Ofcom considered that the programme levelled criticisms at all three. However, it also considered that the programme had clearly sign-posted that it had particularly serious concerns about potentially dangerous consequences, notably with regard to health risks, arising from the actions of the gas fitter.

It is Ofcom’s view that the inclusion of the comments noted above regarding the gas fitter would have made it clear to viewers that the programme regarded his actions as more serious than the actions of the other two traders.

Given the factors noted above Ofcom considered that the programme presented the actions of D R Electricals’ engineer in their own specific context and that these actions, as discussed above, justified the allegation made by the programme that D R Electricals was guilty of bad practice. Ofcom also considered that, although D R Electricals was shown alongside a trader who had taken actions with potentially very serious consequences, the difference in the gravity of these actions was clear to viewers. This was because of the established nature of the *House of Horrors* series of programmes, which often mixed different types of traders who exhibited poor practices of varying degrees of seriousness, and the specific sign-posting regarding the relative gravity of the potential consequences of the traders’ actions in this particular edition.

Ofcom therefore found that the context in which D R Electricals was shown did not result in unfairness to it.

- d) Ofcom then considered the complaint that the programme unfairly recommended that people should not use D R Electricals.

As with head a) above, Ofcom took particular account of Practice 7.9 of the Code.

Ofcom noted that at the end of the report the presenter, who was standing outside D R Electricals premises, concluded the report in the following way:

**Presenter:** *“This is where D R Electricals are based and when we told them what Terry had done, they insisted the fault was hard to find and that Terry gave us good advice – and that getting a new washing machine would be cheaper than fixing it. They also said that Terry believed what he told us, and we weren’t overcharged.”*

*“Well you’ve seen the footage –who do you believe? We say steer clear of D R Electricals in case they take you to the cleaners too!”*



Ofcom recognised that the comment above was a recommendation by the programme not to use D R Electricals because of what the broadcaster considered to be its poor quality service.

However, Ofcom noted that the programme had shown the actions of D R Electricals' engineer and reflected the company's response to the allegations made about it (this is discussed in more detail in the Decision at head d) below). Therefore, Ofcom considered that viewers would have been able to draw their own conclusions about both the actions of the engineer and whether, having observed these actions and heard the company's response to them included in the programme, they would wish to use D R Electricals.

In addition, as noted in the Decisions at head a) above and head c) below, Ofcom considered that the programme had alleged that D R Electricals was responsible for bad practice and that this had not resulted in unfairness to the complainant given the actions of its engineer, which had been fairly reflected in the programme.

Taking all of these factors into account, Ofcom found that in respect of the comment advising viewers not to use D R Electricals, the programme as broadcast did not result in unfairness to the complainant.

- e) Ofcom next addressed the complaint that the programme made unfair allegations about the actions of the company's engineer and unfairly misrepresented him, resulting in unfairness to D R Electricals.

In its considerations Ofcom again took account of Practice 7.9 of the Code.

It also took particular 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 looked at each of the individual concerns raised by D R Electricals in relation to this head of complaint in turn.

- i It considered the complaint that the engineer was unfairly shown as if he were "doing nothing" and that "comical noises were added for effect" when he was actually waiting for the machine to empty before he could open the door.

Ofcom noted the following exchange between the presenter and the DASA expert while they watched the engineer's actions during his first visit:

**Presenter:** *"So what should he be doing?"*

**DASA expert:** *"Well really, pull the machine out, take the lid off, take the rear panel off, and have a really good look inside. I mean, any normal engineer would be doing testing by now."*

**Presenter:** *"he doesn't look like he really knows what he is doing."*

**DASA expert:** *"he looks a bit mystified by it all. I mean he's not even opened his tool box to take his tools out."*

Ofcom also noted that while the engineer was shown with the machine the programme included the sound of wind whistling as if through an empty space in

the background. It also observed that when this footage was repeated later on the programme it was accompanied by the track *"Lazy Sunday Afternoon"*. In addition, Ofcom noted that, having watched the engineer inspect the machine and then recommend that the 'householder' replace it, the DASA expert and the presenter were shown in the following exchange:

**DASA expert:** *"Despicable. He's not done any work. He's not inspected the machine."*

**Presenter:** *"But can you possibly, like he's just done, decide that we need a new machine on the basis of staring at it for a couple of minutes and turning the knob round?"*

**DASA expert:** *"Is that Uri Geller? No definitely not."*

In light of the inclusion of the independent advice by the DASA expert as to what the engineer should have done, Ofcom considered that it was not unfair for the programme to have alleged that he had done nothing to fix the fault in the washing machine. The use of the accompanying noises and music for humorous effect were acceptable given the general tone of the programme, the comments made by the DASA expert and the fact that the engineer was shown not doing anything during this section of the programme.

Ofcom found no unfairness to D R Electricals in this respect.

- ii Ofcom then considered D R Electricals' complaint that, while it acknowledged that its engineer had not inspected the washing machine in any detail, it believed that in not reflecting D R Electricals' view that he had made a diagnosis based on his experience the programme had treated it unfairly.

Ofcom considered both the actions taken by the engineer when he looked at the machine (see the Decisions at heads a) and c) i) above) and the following exchange between the engineer and the woman posing as a householder after his initial inspection.

Having told the 'householder' that it was *"time for a new machine"* the engineer said

**Engineer:** *"Nine time out of ten it's the circuit board, it's not the programme, it's the circuit board on it."*

**Householder:** *"And have you checked that?"*

**Engineer:** *"It's not worth repairing."*

**Householder:** *"It's not worth repairing. Oh right."*

**Engineer:** *"It's going to cost you £200 to put a board on."*

**Householder:** *"To repair it?"*

**Engineer:** *"You might as well have a new one."*

**Householder:** *"Hhmm."*

Ofcom also noted that when the 'householder' again asked if the engineer had inspected the machine, he had acknowledged that he had not taken the circuit board off and then said that *"there's no point taking it off... 'cos er, I've eliminated everything else"*.

Ofcom observed that in response to the allegation that the engineer had not attempted to find the fault during his first visit, Billson and Sharp had told ITV prior to the broadcast that:

"This is not true. The engineer used his 35 years of experience and knowledge of the brand together with a description of the symptoms and a visual inspection, i.e. testing the power was on and the machine would not empty, to conclude that it was the circuit board that was at fault."

Ofcom also observed that in response to the allegation that the engineer had said that the circuit board was broken without having inspected the machine, Billson and Sharp said:

"A visual inspection of the circuit board would not necessarily have shown anything wrong. It was our client's [i.e. D R Electricals'] opinion, based upon the matter referred to above which caused him to conclude that it was the circuit board [that] was at fault."

Ofcom noted that the editing of material is a matter of editorial judgement for the broadcaster. Its concern therefore lay with whether the contribution from Billson and Sharp on behalf of D R Electricals was represented fairly.

Ofcom observed that at the end of the report the programme had reflected D R Electricals' responses by saying:

*"they [D R Electricals] insisted the fault was hard to find and that Terry gave us good advice"*.

In Ofcom's view this was a fair reflection of the response to the allegations noted above in that it included the pertinent points made in Billson and Sharp's letter to the broadcaster.

In addition, Ofcom noted that the programme had referred to the actions taken by the engineer and the comments he made to the 'householder' during and immediately after his initial inspection of the machine.

In light of the inclusion of this material and the fair reflection of the response to the broadcaster's allegations about this incident Ofcom considered that viewers would have been able to draw their own conclusions about the engineer's diagnosis.

Therefore, Ofcom considered that the programme did not treat D R Electricals unfairly with regard to its treatment of the basis of the engineer's initial diagnosis of the fault in the washing machine.

- iii Ofcom considered D R Electricals' complaint that, it was unfair that the fault had been deliberately engineered because this is not a normal expectation when inspecting a washing machine.

In relation to this complaint Ofcom was concerned with whether the programme fairly reflected both how the fault in the washing machine was set up and the

engineer's response to it rather than whether or not the fault was deliberately created.

Ofcom recognised that in this instance the broadcaster had used an independent expert on the repair of washing machines to create the fault. Ofcom noted that the programme explained that the expert had first ensured that the washing machine in question was working and then created the fault. Ofcom observed that in response to a question about how long it would take the engineer to find the complaint, the programme included the expert saying *"It'll take him seconds"*. Ofcom also observed that the programme showed the actions which the engineer took to fix the fault and that when, during his second visit, the back of the washing machine fell off it had taken the engineer only a few seconds to fix the problem.

Taking into account these factors Ofcom considered that the deliberately created fault had fallen within the range of experience one might expect of a reasonable washing machine repair engineer and that D R Electricals had not been treated unfairly in this respect.

Ofcom therefore found no unfairness to the complainant in this respect.

- iv Ofcom considered D R Electricals' complaint that the programme unfairly alleged that the engineer had unnecessarily recommended an overly expensive replacement machine when in fact he recommended the new machine because he felt it would be a more cost effective option than trying to repair the circuit board (which he believed had gone wrong) and that the model would be more suitable for an older person.

Ofcom considered both the actions taken by the engineer when he looked at the machine (see the Decisions at heads a) and c) i) above) and the section of the programme which included the exchange between the engineer and the householder quoted in the Decision at head c) ii) above.

It noted that, having shown the engineer telling the 'householder' that *"we sell new cheaper than anywhere else"* and that a new Bosch washing machine would cost her £259, the programme included the following exchange between the presenter and the expert:

**Presenter:** *"He's saying we need to spend 250 quid on a new machine, but let's get this straight yeah, how much should it take to fix this in terms of time and money?"*

**DASA expert:** *"Erm, time, you are probably talking about less than five minutes"*

**Presenter:** *"And money?"*

**DASA expert:** *"ah £30- £40 tops."*

Ofcom also noted that Terry told the 'householder':

**Engineer:** *"It's going to cost you £200 to put a board on."*

**Householder:** *"To repair it?"*

**Engineer:** *"You might as well have a new one."*

**Householder:** *"Hhmm."*

Ofcom recognised that after the engineer's first visit the presenter summed up his actions as follows:

**Commentary:** *"So he's made up the repair, he's inflated the cost of it so that it costs the same as a brand new machine and then, surprise surprise, sold us one and, all in, its £284."*

Ofcom considered that this was a serious allegation of wrongdoing and therefore that it was incumbent on the broadcaster to offer D R Electricals an opportunity to respond to it.

Ofcom observed that in its letter of 22 February 2007 ITV put the following allegation to D R Electricals: that the engineer had stated falsely that the repair would cost £200 and that the 'householder' should buy a new washing machine instead.

Ofcom also observed that in its response on behalf of D R Electricals Billson and Sharp had told ITV that:

*"It is not untrue to state that the cost of repair of a circuit board would be £200. Secondly, it was the engineer's opinion that it was economically preferable to spend £259 on a new machine rather than £200 on a repair. We cannot see how you can say this statement is untrue."*

As noted under head c) ii) above, the editing of material is a matter of editorial judgement for the broadcaster. Ofcom's concern therefore lay with whether the contribution from Billson and Sharp on behalf of D R Electricals was represented fairly.

Ofcom observed that at the end of the report the programme had reflected D R Electricals' responses by saying:

*"they insisted the fault was hard to find and that Terry gave us good advice – and that getting a new washing machine would be cheaper than fixing it. They also said that Terry believed what he told us, and we weren't overcharged."*

In Ofcom's view this comment included a fair reflection of the response to the allegation. Ofcom recognised that the programme had shown the actions taken by the engineer and the comments he made to the 'householder' during and immediately after his initial inspection of the machine. Ofcom also recognised that, as noted by ITV in its statement, the engineer did not indicate to the 'householder' that he believed the new Bosch machine would be particularly suitable for her as an older person and nor did Billson and Sharp's response to ITV's allegations make such a point.

In light of the inclusion of the engineer's own actions and comments and the fair reflection of D R Electricals' response to the broadcaster's allegations about this incident, Ofcom considered that viewers would have been able to draw their own conclusions about whether the engineer had unnecessarily recommended an overly expensive replacement machine.

Therefore, Ofcom considered that the programme did not treat D R Electricals unfairly with regard to its treatment of the engineer's recommendation that the householder buy a new Bosch washing machine.

- v Ofcom considered D R Electricals' complaint that the programme had unfairly alleged that its engineer had unnecessarily fitted a new pump, that he had overcharged for doing so and that he had fitted it badly and left it in a dangerous condition.

Ofcom noted that the programme included footage of the engineer having accidentally found and then fixed the fault on the old washing machine, by putting the motor plug back in. It also observed that the programme had explained that he had refitted the old machine, run a wash cycle to check that the machine was working and told the 'householder' that *"it's not emptying the water"* and that *"the pump's gone"*.

Ofcom observed the following comments made by the presenter and the DASA expert in relation to the engineer's decision to fit a new pump:

**Presenter:** *"The pump's gone?"*

**DASA expert:** *"Nothing wrong with that pump."*

**Presenter:** *"You sure?"*

**DASA expert:** *"Yeah, that machine was tested just before he came in. He just doesn't know how to operate the machine. There's nothing wrong with the machine at all."*

It noted the following comments made by the presenter and the DASA expert about the charge for the new pump:

**Presenter:** *"Is a £100 for a new pump which we don't need, bear that in mind, is that reasonable?"*

**DASA expert:** *"No, the pumps themselves would retail about £20."*

**Presenter:** *"So, he's, at the last minute, he's spotted a money making opportunity and there was us thinking he'd redeemed himself but in fact he hasn't."*

Ofcom also noted these comments made by the independent expert about the way in which the pump was fitted:

**DASA expert:** *"He has fitted a new pump, albeit badly. The cables are not professionally attached. That wire'll come loose, it'll stop working again within a short period of time."*

**Presenter:** *"Dangerous at all?"*

**DASA expert:** *"They're not insulated which means if they come off there is possibly danger of electric shock."*

**Presenter:** *"Why did he change his mind about flogging us a brand new washing machine?"*

**DASA Expert:** *“He realised there’d be much more profit in fitting a pump, or doing a repair than actually selling you the machine. It’s quite a common rip off I would say.”*

**Presenter:** *“Er right, and this is the original pump, yeah?”*

**DASA Expert:** *“Yeah, before the visit this had been tested thoroughly and it’s working fine.”*

Again, Ofcom considered that this was a serious allegation to which it was incumbent upon the broadcaster to offer D R Electricals an appropriate and timely opportunity to respond.

Ofcom observed that in its letter of 22 February 2007 ITV put the following allegation to D R Electricals: the engineer had fitted the pump badly in that the wires were not fixed to the connectors properly and normal use would easily loosen the cables and therefore create the danger of electric shock and prevent the machine from working within a short period. Ofcom also observed that within the same letter ITV stated that “the universal pump fitted by the engineer normally retails at about £20 to £30” and asked for a comment on the allegation that “the engineer installed a pump that was not necessary and overcharged us”.

In its response on behalf of D R Electricals Billson and Sharp told ITV that:

“The connectors were properly fitted, otherwise the pump would not have worked” and that “You [i.e. ITV] completely ... ignore[d] the fact that our client carried out the labour of fitting the pump” and “we do not consider that labour for almost two hours of £57.35 can be considered to be excessive.”. Billson and Sharp added that “our client’s engineer did not install a pump that was not necessary and it is simply not true to state that the householder was overcharged.”.

In relation to these specific allegations Ofcom noted that the programme reflected D R Electricals’ position that the engineer had acted in good faith in that it included the presenter saying *“They [i.e. the complaint] also said that Terry believed what he told us, and we weren’t overcharged.”*. (See the Decision at head c) iv) above for the full quotation).

In Ofcom’s view this was a fair reflection of the complainant’s response to the allegations made about the pump in the programme and therefore Ofcom considered that the complainant was not treated unfairly with regard to the way in which the programme dealt with the engineer’s fitting of, and charge for, the new pump.

Taking into account all the considerations noted at heads c) i) to v) above, Ofcom found that the programme’s treatment of the actions taken by the engineer did not result in unfairness to D R Electricals.

- f) Ofcom considered the complaint that, despite D R Electricals having offered to talk to the programme makers and the washing machine repair expert, it was not given an appropriate or timely opportunity to respond to the allegations made about its practices as a result of the surreptitious filming.

Ofcom recognised that was a complaint of unfairness in relation to whether or not the complainant was given an appropriate and timely opportunity to respond to the allegations made about it in the programme rather than in relation to the inclusion of information gained through the use of deception (in this case surreptitious filming) in the programme.

Ofcom noted the allegations made about D R Electricals in the programme, namely, that the engineer had not inspected the machine properly and thereby failed to find the fault with the motor plug and had misdiagnosed the fault as a problem with the circuit board and therefore recommended an unnecessary and overly-expensive replacement washing machine. The programme also alleged that having found the fault by accident (and fixed it) Terry had unnecessarily fitted a new pump on the old washing machine and that he had done so badly and overcharged for doing it. As discussed in the Decision at head c) above, Ofcom considered that these allegations were serious and that therefore it was incumbent on the broadcaster to offer D R Electricals an opportunity to respond to them.

Ofcom recognised that D R Electricals was given such an opportunity in the letter sent to it by the Executive Producer of *House of Horrors* on 22 February 2007. This letter detailed the nature of the report, set out a series of comments made by the DASA expert about the actions of D R Electricals engineer and asked for a response to five key allegations. Ofcom also recognised that on 6 March 2007 Billson and Sharp sent a letter to the Executive Producer, on behalf of D R Electricals, in which it responded to the points raised by ITV.

In addition Ofcom noted that in this letter D R Electricals offered to meet ITV in the following manner:

“If you wish to meet to discuss the matter and to show us the video footage and for us to make points direct to your “expert” then our client would be happy to do so upon receiving assurance that the footage is not to be broadcast in the meantime. We therefore must hear from you within the next seven days to avoid action being taken without further notice to you.”

As regards the complaint concerning D R Electricals’ offer to meet ITV and its expert, Ofcom recognised that the Code requirement is that an appropriate and timely opportunity to respond should be given to any party about which significant allegations have been made (Practice 7.11). It was not incumbent on ITV to meet with D R Electricals or to have shown it the footage of the programme prior to broadcast, but rather to give the company an appropriate and timely opportunity to respond.

In addition, Ofcom considered that it was not incumbent on the broadcaster to give the owner of the business an on camera interview, after the presenter was shown standing outside D R Electricals’ shop recommending that people should not use its services (as indicated within the original complaint). Rather, having given D R Electricals an opportunity to respond the broadcaster was required to ensure that its contributions were “represented fairly” (Practice 7.6). As noted in the Decision at head c) above, Ofcom considered that the programme had included a fair reflection of D R Electricals’ responses to all the allegations made about it.

In light of these factors, Ofcom found that D R Electricals was given an appropriate and timely opportunity to respond to the allegations made about it in the programme.



- g) Lastly, Ofcom addressed D R Electricals' complaint that its privacy had been unwarrantably infringed in both the making and the broadcast of the programme in that it included footage which was filmed surreptitiously and broadcast without consent.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy, Ofcom will therefore, where necessary, address itself to two distinct questions: First, has there been an infringement of privacy? Second, if there was an infringement of privacy was the infringement warranted?

Ofcom took particular account of the obligation within the Code which states that "any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted" (Rule 8.1). The Code also explains that an individual's "legitimate expectation of privacy will vary according to the place and nature of the information, activity or condition in question".

In considering D R Electricals' privacy complaint in relation to the making of the programme, Ofcom took particular account of 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"; and, Practice 8.13 which states that "surreptitious filming or recording should only be used where it is warranted. Normally, it will only be warranted if: there is prima facie evidence of a story in the public interest; and there are reasonable grounds to suspect that further material evidence could be obtained; and it is necessary to the credibility and authenticity of the programme". In considering the complaint in relation to the broadcast of the programme, Ofcom also took particular account of Practice 8.14 which states that material gained by surreptitious filming and recording should only be broadcast when it is warranted.

In reaching a decision about whether D R Electricals' privacy was infringed in the making and/or the broadcast of the programme, Ofcom sought to establish whether the company had a legitimate expectation of privacy.

Ofcom noted that this complaint was brought on behalf of D R Electricals the company rather than on behalf of its employee.

Ofcom acknowledged that a company could have a legitimate expectation of privacy in terms of the obtaining and broadcast of surreptitiously filmed footage of one of its employees depending on the circumstances of the case. However, it also recognised that a company's legitimate expectation of privacy would be limited in comparison with the expectation of privacy which might pertain to an individual in that it would relate only to activities of a private nature which need protection from unwarranted intrusion. Examples of such activities would include, but are not necessarily limited to, exchanges which took place in the confines of a closed board meeting, correspondence which could justifiably be regarded as private or the dissemination of internal policies or procedures. Conversely there are many activities that would be unlikely to attract an expectation of privacy for a company. Examples of such activities would include services a company offers directly to the public which are either specifically advertised by the company for the purposes of soliciting trade or are otherwise a matter of public knowledge or record.

In this case Ofcom noted that the footage which was surreptitiously filmed and then broadcast was of one of D R Electricals' employees while he was at work and that in this footage he was carrying out a function which he regularly undertook for the company. Ofcom also noted that the footage showed this individual providing a service within the home of a member of the public.

Ofcom considered that this footage showed the actions of an individual (i.e. an engineer answering a call-out by a 'householder' seeking someone to fix her washing machine). While it recognised that this individual was carrying out these actions as an employee of D R Electricals, Ofcom considered that the footage did not include material of an intrinsically private nature to the company in that the actions shown did not portray any of the company's internal practices and it did not include, for example, confidential documentation or areas where access was restricted to company employees. In fact, it showed the engineer carrying out an activity which the company offers directly to the public in the home of the 'householder'. Information relating to this public-facing function (which would be advertised by the company) would already be in the public domain.

Taking account of these factors Ofcom was not satisfied that, on balance, D R Electricals had a legitimate expectation in the specific circumstances in relation to the obtaining and broadcasting of footage of its engineer carrying out a public-facing function for the company.

Given that Ofcom was not satisfied that D R Electricals had a legitimate expectation of privacy in the circumstances of this case, Ofcom found that there was no infringement of its privacy in either the making or the broadcast of the programme. Therefore, Ofcom did not go on to consider the question of whether any infringement was warranted.

**Accordingly, the complaints of unfair treatment and the complaint of unwarranted infringement of privacy in the making and broadcast were not upheld.**

## Complaint by Mr Gareth Nixon

*The Truth About Binge Drinking, ITV1, 3 January 2008*

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**Summary:** Ofcom has not upheld this complaint of unwarranted infringement of privacy in the making and broadcast of the programme, made by Mr Gareth Nixon.

On 3 January 2008, ITV broadcast a documentary entitled *The Truth About Binge Drinking*. The opening sequences of the programme featured a montage of clips in which various individuals were shown consuming, or under the influence of, alcohol.

The complainant, Mr Nixon, was shown in two brief shots. The first showed Mr Nixon walking with his friend who appeared to be helping him to stand upright. The second showed Mr Nixon sitting on the pavement with his friend. In the programme as broadcast, Mr Nixon's face had been blurred in the first shot, but not the second.

Mr Nixon complained that his privacy had been unwarrantably infringed as he had been filmed without his knowledge or consent; and, the programme had broadcast an identifiable shot of him in which his face had not been obscured.

Ofcom found as follows:

- Ofcom found that Mr Nixon did not have a legitimate expectation of privacy in relation to the making or broadcast of the programme. Ofcom found that Mr Nixon had been filmed in the open, on a public street, when his actions had been clearly visible to others around him. Ofcom considered that while Mr Nixon had been intoxicated at the time of filming, neither this, nor his actions (which were not of a particularly sensitive or private nature) afforded him a greater expectation of privacy.

Ofcom therefore found that neither the filming nor broadcast of footage of Mr Nixon infringed his privacy. Accordingly, Ofcom has not upheld Mr Nixon's complaint of unwarranted infringement of privacy.

### Introduction

On 3 January 2008, ITV broadcast a documentary entitled *The Truth About Binge Drinking* in which singer, Michelle Heaton, agreed to engage in binge drinking for a period of one month to demonstrate the dangers of excessive consumption of alcohol.

The opening sequences of the programme featured a montage of clips in which various individuals were shown consuming, or under the influence of, alcohol. Mr Nixon (who was not named) was shown in two scenes. The first, showed Mr Nixon walking with his friend who appeared to be helping him stand upright and the second showed him sitting on the pavement with his friend. In the programme as broadcast, Mr Nixon's face had been blurred in the first shot, but not the second.

Mr Nixon complained to Ofcom that his privacy had been infringed in the making and broadcast of the programme.

## The Complaint

- a) In summary, Mr Nixon complained that his privacy had been unwarrantably infringed in the making of the programme in that the programme makers had filmed him without his knowledge or consent.
- b) In summary, Mr Nixon complained that his privacy had been unwarrantably infringed by the broadcast of an identifiable shot of him without his knowledge or consent. Mr Nixon said that whilst the first shot of him was obscured, the second shot was not and he said the camera focused on him for a number of seconds.

## ITV's statement in response to the complaint

ITV provided a statement in response to the complaint. In summary, ITV responded as follows:

- a) ITV said Mr Nixon did not have a legitimate expectation of privacy in relation to the making of the programme because he had been filmed in a public place and the filming had been carried out openly by a camera crew who were very visible and relatively close to Mr Nixon at the time of filming. ITV said that Mr Nixon was drunk and had been acting in a drunken manner and that it did not believe that drunkenness in a public place was a private matter for an individual.

ITV said that if it was that Mr Nixon did have a legitimate expectation of privacy in relation to the making of the programme, it would argue that the filming was warranted by the purpose of the programme, which was to expose the binge drinking culture in the UK and its effect on people's health (especially that of the young).

- b) In relation to Mr Nixon's complaint that his privacy had been infringed by the broadcast of identifiable footage of him, ITV said it did not believe that either shot of Mr Nixon required his face to be obscured. However in the final edit, the decision had been taken to blur the first shot of Mr Nixon as in it, he appeared to be in an altercation. ITV said that neither the blurred nor unblurred shots of him infringed his privacy.

ITV said it did not believe that Mr Nixon had a legitimate expectation of privacy in relation to the broadcast. ITV said it appreciated that Mr Nixon might feel uncomfortable that his behaviour was seen by viewers of the programme, but said that many other people would have seen his behaviour in the street on the night itself.

ITV said that if Mr Nixon did have a legitimate expectation of privacy in relation to broadcast of the footage, it would argue that any interest in Mr Nixon being obscured was outweighed by the public interest in depicting drunken and antisocial behaviour in full as part of a programme exploring the UK's binge drinking culture.

## 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 in programmes, and from unwarranted

infringement of privacy in the making and broadcast 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.

Mr Nixon's complaint was considered by Ofcom's Executive Fairness Group. In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties, including a recording of the programme, a transcript of the relevant part of the programme and both parties' written submissions.

In Ofcom's view, the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy both in relation to the making and the broadcast of the programme, Ofcom must consider two distinct questions: First, has there been an infringement of privacy? Secondly, if so, was it warranted?

- a) Ofcom first considered Mr Nixon's complaint of unwarranted infringement of privacy in the making of the programme.

In considering whether the making of the programme infringed the complainant's privacy, Ofcom considered whether Mr Nixon had a legitimate expectation of privacy in the circumstances that he was filmed.

Ofcom viewed a recording of the programme and made the following observations. It appeared to Ofcom that the filming took place on a public street and in the open, since the footage had been filmed from a clear vantage point and did not display any of the signs of poor quality that are usually associated with surreptitious filming, such as graininess, shaking or obstruction. Ofcom recognised that, given Mr Nixon's intoxicated state, he may not have been aware that he was being filmed. However, Ofcom found no evidence to suggest that the programme makers had concealed the fact that they were filming him or that their actions were in any way surreptitious.

Ofcom next considered the nature of the actions recorded by the programme makers. Ofcom noted that Mr Nixon had been in a public place and at the time of filming and Mr Nixon's and his friend's actions had been in clear view of others around them. In Ofcom's view, although Mr Nixon had appeared to be intoxicated at the time of being filmed, his actions while in this state were not of an inherently private or sensitive nature. On the information before it and in the circumstances of this case, Ofcom considered that neither Mr Nixon's state of intoxication nor his actions while in such a state afforded him a greater expectation of privacy.

Taking into consideration all of the factors above, it is Ofcom's view that Mr Nixon did not have a legitimate expectation of privacy. Given this Ofcom therefore found that Mr Nixon's privacy was not infringed in the making of the programme, and it was not necessary for Ofcom to further consider whether any infringement of privacy was warranted.

- b) Ofcom next turned to the complaint regarding the broadcast of identifiable footage of Mr Nixon without his knowledge or consent. Mr Nixon said that whilst

the first shot of him was obscured, the second shot was not and said the camera had focused on him for a number of seconds.

In considering whether the broadcast of the programme infringed the complainant's privacy, Ofcom considered whether Mr Nixon had a legitimate expectation of privacy in the circumstances in respect of the footage of him.

Ofcom viewed a recording of the programme as broadcast and noted that it contained brief footage of Mr Nixon and his friend when both appeared to be under the influence of alcohol. The first shot showed Mr Nixon walking with his friend who appeared to be helping him to stand upright and, the second showed him sitting on the pavement with his friend.

Ofcom noted that Mr Nixon had not been named in the broadcast and the programme makers had taken steps to obscure his identity in the first of the two shots. Ofcom also noted that in the second shot, Mr Nixon's face was visible. In Ofcom's view, Mr Nixon would have been identifiable from this second shot.

While Ofcom acknowledged that Mr Nixon may have been identifiable in the broadcast, in its opinion, the footage did not reveal information about Mr Nixon that was of a particularly private or sensitive nature. Mr Nixon's actions in the footage had taken place on a public street in full view of others around them and were not of a particularly sensitive nature.

In the circumstances, Ofcom did not believe that Mr Nixon had a legitimate expectation of privacy in relation to the broadcast of the footage. Given this Ofcom found that Mr Nixon's privacy was not infringed in the broadcast of the programme and it was not necessary for Ofcom to further to consider whether any infringement of privacy was warranted.

**Accordingly, Ofcom has not upheld Mr Nixon's complaint of unwarranted infringement of privacy in either the making or broadcast of the programme.**

## Other Programmes Not in Breach/Resolved

4 – 17 June

Programme	Trans Date	Channel	Category	No of Complaints
60 Years Palestinian Suffering	15/05/2008	Islam Channel	Generally Accepted Standards	1
American Idol	20/03/2008	ITV2	Advertising	1
Andrew Pierce and Friends	04/05/2008	LBC 97.3	Due Impartiality/Bias	1
BBC News	02/06/2008	BBC1	Religious Offence	1
BBC News	30/05/2008	BBC1	Generally Accepted Standards	1
BBC News	05/06/2008	BBC1	Substance Abuse	1
BBC News	14/05/2008	BBC1	Generally Accepted Standards	3
BBC News	18/05/2008	BBC1	Generally Accepted Standards	2
BBC News	11/06/2008	BBC1	Due Impartiality/Bias	1
BBC News	29/05/2008	BBC1	Generally Accepted Standards	1
Big Brother 9	05/06/2008	Channel 4	Generally Accepted Standards	6
Big Brother 9	07/06/2008	Channel 4	Generally Accepted Standards	6
Big Brother 9	08/06/2008	Channel 4	Offensive Language	2
Big Brother 9	06/06/2008	Channel 4	Generally Accepted Standards	1
Big Brother 9	10/06/2008	Channel 4	Offensive Language	2
Big Brother 9	11/06/2008	Channel 4	Offensive Language	3
Big Brother 9	12/06/2008	Channel 4	Offensive Language	1
Big Brother 9	12/06/2008	Channel 4	Generally Accepted Standards	1
Big Brother 9	05/06/2008	Channel 4	Offensive Language	1
Big Brother 9	05/06/2008	Channel 4	Religious Offence	4
Breakfast	04/04/2008	BBC Radio Lancs	Generally Accepted Standards	1
Breakfast	14/05/2008	BBC1	Religious Offence	4
Britain's Got Talent	30/05/2008	ITV1	Use of Premium Rate Numbers	5
Britain's Got Talent	31/05/2008	ITV1	Use of Premium Rate Numbers	19
Britain's Got Talent	29/05/2008	ITV1	Generally Accepted Standards	1
Bullseye	15/06/2008	Challenge+1	Other	1
CSI: Crime Scene Investigation	03/06/2008	Five	Violence	1
Carl Kinsman	07/06/2008	Cool FM	Generally Accepted Standards	1
Channel 4 News	07/05/2008	Channel 4	Due Impartiality/Bias	1

Channel 4 News	30/05/2008	Channel 4	Generally Accepted Standards	1
Channel 4 News	05/06/2008	Channel 4	Generally Accepted Standards	1
Channel 4 News	26/05/2008	Channel 4	Generally Accepted Standards	1
Coronation Street	28/05/2008	ITV1	Generally Accepted Standards	7
Coronation Street	30/05/2008	ITV1	Crime (incite/encourage)	1
Coronation Street	13/06/2008	ITV1	Substance Abuse	1
Cutting Edge: 13 Kids & Wanting More	22/05/2008	Channel 4	Due Impartiality/Bias	1
Derren Brown: Trick or Treat	30/05/2008	Channel 4	Dangerous Behaviour	1
Derren Brown: Trick or Treat	06/06/2008	Channel 4	Dangerous Behaviour	1
Dispatches: In God's Name	19/05/2008	Channel 4	Inaccuracy/Misleading	20
Dog Borstal	29/03/2008	BBC3	Offensive Language	1
Eastenders	02/06/2008	BBC1	Crime (incite/encourage)	4
Eastenders	03/06/2008	BBC1	Generally Accepted Standards	1
Eastenders	27/05/2008	BBC1	Generally Accepted Standards	1
Eastenders	06/06/2008	BBC1	Substance Abuse	1
Eastenders	06/06/2008	BBC1	Generally Accepted Standards	2
Eastenders	03/06/2008	BBC1	Offensive Language	1
Emmerdale	04/06/2008	ITV1	U18's in Programmes	6
Eurovision Song Contest 2008	24/05/2008	BBC1	Generally Accepted Standards	1
F1: Canadian Grand Prix Live	08/06/2008	ITV1	Due Impartiality/Bias	2
Female Hoarders: Hidden Lives	29/05/2008	Five	Information/Warnings	1
Filth: The Mary Whitehouse Story	28/05/2008	BBC2	Generally Accepted Standards	1
Fine Wine	16/05/2008	Channel U	Generally Accepted Standards	1
Five News	22/05/2008	Five	Generally Accepted Standards	1
Five News	09/06/2008	Five	Dangerous Behaviour	1
Football First: Game of the Day	11/05/2008	Sky Sports 1	Offensive Language	1
Friday Night with Jonathan Ross	06/06/2008	BBC1	Offensive Language	1
Friday Night with Jonathan Ross	06/06/2008	BBC1	Generally Accepted Standards	1
Fur TV	22/05/2008	MTV	Generally Accepted Standards	1
GMTV	01/05/2008	ITV1	Generally Accepted Standards	53



GMTV	04/06/2008	ITV1	Substance Abuse	1
Girlfriends (trailer)	28/05/2008	Trouble TV +1	Offensive Language	1
Gladiators	25/05/2008	Virgin 1	Generally Accepted Standards	1
Golden Balls	n/a	ITV1	Competitions	1
Golden Balls	22/05/2008	ITV1	Generally Accepted Standards	1
Gordon Ramsay's F Word	03/06/2008	Channel 4	Offensive Language	1
Gordon Ramsay's F Word	03/06/2008	Channel 4	Animal Welfare	3
Gordon Ramsay's F Word	27/05/2008	Channel 4	Generally Accepted Standards	1
Grand Designs Live	07/05/2008	C4 +1	Competitions	1
Hawksbee and Jacobs	22/05/2008	Talksport	Generally Accepted Standards	1
Holby Blue	05/06/2008	BBC1	Crime (incite/encourage)	1
Hollyoaks	05/06/2008	Channel 4	Violence	1
How TV Changed Britain	01/06/2008	Channel 4	Offensive Language	1
How TV Changed Britain	08/06/2008	Channel 4	Offensive Language	1
How TV Changed Britain	08/06/2008	Channel 4	Sex/Nudity	1
I Own Britain's Best Home	10/04/2008	Five	Use of Premium Rate Numbers	1
ITV News	05/06/2008	ITV1	Generally Accepted Standards	1
ITV News	26/05/2008	ITV1	Inaccuracy/Misleading	1
Ian Wright and Adrian Durham	19/05/2008	Talksport	Generally Accepted Standards	10
It Pays to Watch	02/04/2008	Five	Due Impartiality/Bias	1
James O'Brien	03/06/2008	LBC 97.3 FM	Generally Accepted Standards	1
Jeremy Kyle Show	02/06/2008	ITV1	Crime (incite/encourage)	1
Jeremy Vine	21/05/2008	BBC Radio 2	Generally Accepted Standards	1
Jon Gaunt	16/05/2008	Talksport	Due Impartiality/Bias	1
Kia Motors sponsorship of CSI / Law & Order	n/a	Five	Crime (incite/encourage)	2
Kiss of Death	26/05/2008	BBC1	Generally Accepted Standards	5
LK Today	12/06/2008	ITV1	Inaccuracy/Misleading	2
LK Today	04/06/2008	ITV1	Inaccuracy/Misleading	1
LK Today	02/06/2008	ITV1	Sex/Nudity	1
Law & Order	06/06/2008	Five	Offensive Language	1
Look North	05/06/2008	BBC1	Due Impartiality/Bias	1
Loose Women	13/06/2008	ITV	Competitions	1
Midsomer Murders	21/03/2008	ITV1	Advertising	1

Mike Mendoza	17/05/2008	Talksport	Generally Accepted Standards	1
My Spy Family	n/a	Boomerang	Substance Abuse	1
Nach Baliye	15/03/2008	Star Plus	Advertising	1
News	18/05/2008	Sunrise Radio	Religious Offence	1
News Quiz	03/05/2008	BBC Radio 4	Other	1
News at Ten	03/06/2008	ITV1	Generally Accepted Standards	1
News at Ten	12/05/2008	ITV1	Due Impartiality/Bias	1
Newsround	03/06/2008	CBBC	Commercial References	1
Real Radio Breakfast Show (promo)	23/05/2008	Real Radio (Scotland)	Generally Accepted Standards	1
Reaper	13/02/2008	E4+1	Advertising	1
River Cottage Spring	04/06/2008	Channel 4	Due Impartiality/Bias	1
Road Wars	04/06/2008	Sky Three	Crime (incite/encourage)	1
Russell Watson: Fighting For Life: Tonight	30/05/2008	ITV1	Inaccuracy/Misleading	1
Seaside Rescue	01/06/2008	BBC1	Inaccuracy/Misleading	1
Simon Bates	04/06/2008	Classic FM	Offensive Language	1
Sky News	16/05/2008	Sky News	Advertising	1
Steve Allen	14/05/2008	LBC	Generally Accepted Standards	1
Steve Allen	25/05/2008	LBC 97.3FM	Generally Accepted Standards	1
Sunday Live with Adam Boulton	11/05/2008	Sky News	Offensive Language	1
T4	31/05/2008	Channel 4	Sex/Nudity	1
Taggart - Point of Light	05/06/2008	ITV1	U18's in Programmes	2
Take That Live at the O2	08/06/2008	Channel 4	Sex/Nudity	1
That's So Suite Life of Hannah Montana	26/05/2008	Disney	Inaccuracy/Misleading	1
The Apprentice	11/06/2008	BBC1	Generally Accepted Standards	1
The Apprentice: You're Fired!	04/06/2008	BBC2	Offensive Language	1
The Biggest Chinese Restaurant in the World	27/05/2008	BBC4	Animal Welfare	3
The Bourne Identity	13/05/2008	ITV2	Sponsorship	1
The Breakfast Show	30/05/2008	Real Radio (Wales)	Crime (incite/encourage)	2
The Brit Awards 2008	20/02/2008	ITV1	Offensive Language	1
The Dog Whisperer	31/05/2008	Sky Three	Animal Welfare	1
The Great British Body	02/06/2008	ITV1	Sex/Nudity	10

The Great British Body (trailer)	02/06/2008	ITV1	Sex/Nudity	3
The Inspector Linley Mysteries	25/05/2008	BBC1	Generally Accepted Standards	1
The Jeremy Kyle Show	03/05/2008	Plymouth Sound	Offensive Language	2
The Karate Kid	31/05/2008	ITV1	Advertising	2
The ONE Show	03/06/2008	BBC1	Generally Accepted Standards	2
The Simpsons	05/06/2008	Channel 4	Advertising	1
The Sunday Night Project	08/06/2008	Channel 4	Generally Accepted Standards	1
The World at War	27/05/2008	UKTV History	Advertising	1
The World's Smallest Man and Me	20/05/2008	Channel 4	Generally Accepted Standards	1
The Wright Stuff	n/a	Five	Inaccuracy/Misleading	1
The Yorkshire Ripper - Mind of a Killer Revealed	13/05/2008	Five	Generally Accepted Standards	1
Thinking Allowed	28/05/2008	BBC Radio 4	Religious Offence	1
This Is England	02/06/2008	Film 4	Generally Accepted Standards	1
This Morning	05/06/2008	ITV1	Sex/Nudity	1
This Morning	n/a	ITV1	Competitions	1
Toughest Villages in Britain	26/05/2008	Sky Three	Animal Welfare	1
Trial and Retribution	20/03/2008	ITV1	Sex/Nudity	1
UEFA Euro 2008 promotions	n/a	ITV1	Generally Accepted Standards	7
UTV Live	21/02/2008	UTV	Inaccuracy/Misleading	1
Victoria Derbyshire	03/06/2008	BBC Radio 5 Live	Generally Accepted Standards	1
Weakest Link	06/06/2008	BBC1	Generally Accepted Standards	2
Wyatt and Natasha's Breakfast Show	28/05/2008	SGR Colchester	Commercial References	1
You Are What You Eat (Trailer)	26/05/2008	Discovery Real Time	Generally Accepted Standards	1
Zoey 101	28/05/2008	Nickelodeon	Offensive Language	1