

INDEPENDENT
PRODUCER HANDBOOK

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CHANNEL 4 AND FIVE

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The information and guidance
contained in this Handbook is correct
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made to the Channel 4 or Five websites
for the most up-to-date guidance.
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1

INTRODUCTION

THE AIM OF THE INDEPENDENT PRODUCER HANDBOOK

This Independent Producer Handbook aims to give helpful and practical guidance to all of Channel 4's and Five's programme-makers and editorial staff on the Ofcom Broadcasting Code rules and the main areas of law that apply to the making and broadcast of programmes on Channel 4 and Five.

It is the responsibility of every executive producer and producer making a programme for Channel 4 or Five to ensure that every member of the production team has read and is familiar with the relevant sections of the Handbook (including best practice guidelines) and follows the rules and procedures it contains.

The Handbook contains:

- Channel 4's and Five's own internal compliance procedures;
- A summary of the most important Ofcom Code rules;
- A more detailed explanation and commentary on the Code rules;
- A summary of the main areas of media law;
- Best practice check-lists for specific programme areas;
- Programme-makers' FAQs and answers for each area of the Code and media law, together with some practical examples;
- Channel 4's and Five's own best practice guidelines and protocols for certain areas of programme-making and broadcasting.

We are the UK's only public service commercial broadcasters that commission all our original programming from independent production companies.

Our aim is for this Handbook to be a genuinely useful tool for programme-

makers at every level. We hope that by creating a 'one-stop shop' for best practice and compliance, the Handbook will lead to greater clarity and consistency of approach in the industry. We hope that you will both welcome and benefit from this.

The compliance process works most effectively as a shared responsibility between the broadcasters' editorial teams and the programme-makers, with appropriate and timely advice from a programme lawyer in the legal and compliance department. Effective compliance means being able to broadcast the most creatively challenging programmes and defend them successfully before the courts, to Ofcom after broadcast, and in the press where necessary. It is essential that programme-makers work closely with their editorial colleagues at Channel 4 and Five and with their respective legal and compliance departments. Judgements are often difficult and subjective but the earlier potential problems and issues are addressed, the more likely it is that the creative ambitions for your programme can be achieved.

Channel 4 and Five are responsible broadcasters and we want our programme-makers to follow best practice at all times. In our experience, sound practical knowledge of both the Ofcom Broadcasting Code and the law equips programme-makers to identify and address problems and understand the need to seek advice. This in turn enables the most challenging programmes to be both made and broadcast and to be successfully defended after transmission. We are committed to freedom of expression – our own, that of our programme-makers and that of our audiences to receive creative and bold material within the parameters of the Ofcom Broadcasting Code and the law.

Viewer trust is of paramount importance to Channel 4 and Five and this issue must be given the highest priority by our programme-makers to ensure that our audiences can be confident that our programmes are true, accurate and fair and that they are never misled by them.

WHAT IS OFCOM?

Ofcom (the Office of Communications) regulates the content of all television and radio programmes in the UK, including programmes on the BBC and all digital channels, as well as Channel 4, Five and ITV. Ofcom operates the Ofcom Broadcasting Code ("the Code") which contains rules and principles covering standards in programmes, sponsorship and fairness and privacy. Ofcom replaced the old regulators, the Independent Television Commission (ITC), the Broadcasting Standards Commission (BSC) and the Radio Authority. The Ofcom Broadcasting Code replaced the old ITC and BSC codes.

Channel 4 and Five, like all commercial broadcasters, are licensed by Ofcom to broadcast, subject to compliance with its codes. Ofcom can only take action after broadcast. The broadcaster is ultimately responsible, along with its programme-makers, with the involvement of both editorial staff and lawyers experienced in compliance, to ensure that a programme complies with the Code and can be robustly defended after broadcast to Ofcom in terms of content, scheduling and labelling.

Failure to comply is likely to result in details of the Code breach being published by Ofcom and, in the case of serious or persistent breaches, it can impose sanctions. Ofcom has the power to issue a direction to broadcast a summary of its adjudication to air; impose a fine (which could be

substantial) or (but not in the case of Channel 4 itself) even shorten or remove a channel's licence to broadcast. The imposition of a sanction and the adverse press that creates damages the reputation of both the broadcaster and the programme-makers.

WHAT IS PHONEPAYPLUS?

PhonepayPlus, formerly known as ICSTIS (Independent Committee for the Supervision of Standards of Telephone Information Services), is the statutory organisation which regulates the provision of premium rate telephone services, including those used in television and radio programmes. PhonepayPlus publishes a Code of Practice which must be complied with. It too can impose fines on service providers for breaches of its Code. In addition, it is a provision of the Ofcom Code that broadcasters and their producers comply with the PhonepayPlus Code.

WHAT IS THE ASA AND BCAP?

The Advertising Standards Authority ("ASA") regulates television advertising with Ofcom acting as the ultimate regulatory body. The Broadcast Committee of Advertising Practice ("BCAP") is the industry body responsible for the UK's advertising Codes. The regulation of advertising is not dealt with in this Handbook.

WHAT CONTENT HAS TO COMPLY WITH THE OFCOM BROADCASTING CODE?

All broadcast output is regulated i.e. programmes (whether commissioned or acquired), trailers for programmes, advertisements, continuity announcements, and any text service e.g. 4-Tel. In addition, Channel 4 and Five expect any new media

output (e.g. online and interactive services etc.) to adhere to the same standards of good practice as our programmes.

The Code applies to all radio services and programmes and so any programme-maker or editor working on a radio programme should read 'listener' for 'viewer'.

In the Code itself, Ofcom acknowledges the importance of freedom of expression – both freedom for the broadcaster to be creative and for audience choice - but points out that with those rights come duties and responsibilities. In particular, those responsibilities include the need to ensure people make informed viewing choices and that appropriate protections, especially for younger viewers, are in place.

The Code has 10 sections:

- 1) Protecting the under 18s;
- 2) Harm and offence;
- 3) Crime;
- 4) Religion;
- 5) Due impartiality and due accuracy and undue prominence of views and opinions;
- 6) Elections and referendums;
- 7) Fairness;
- 8) Privacy;
- 9) Sponsorship; and
- 10) Commercial references and other matters.

Each section contains a number of "Principles" and "Rules" with the Fairness and Privacy sections containing a set of "practices to be followed".

The Code does not try to address each and every situation that might arise in the making and broadcasting of television and radio programmes but, rather, sets out principles and rules in order to help broadcasters (with programme-makers) make the necessary judgments themselves. In addition, from time-to-time, Ofcom

publishes and regularly updates guidance on areas of the Code on its website at www.ofcom.org.uk. This Handbook incorporates that guidance at the time of publication where appropriate.

HOW TO USE THE HANDBOOK

The following two chapters (chapters 2 and 3 respectively) set out Channel 4's and Five's own compliance procedures which they have developed respectively to help ensure best practice and compliance with the Code. All producers should read through these chapters, so they are aware of their crucial role in the compliance process.

Chapter 4 reflects the basic structure of the Code, although in some cases more than one section of the Code has been combined into one sub-chapter e.g. Protection of Under 18s and Harm and Offence are dealt with in a single sub-chapter: 4A. Within this chapter, each sub-chapter contains a summary of the Code's rules and, where appropriate, some commentary and further explanation.

Chapter 5 contains a summary of the main areas of media law that affect the making and broadcasting of programmes. It is hoped that this chapter will enable producers and editorial staff to identify areas of the law that might be associated with and affect the programmes they are working on, to enable them to seek timely legal advice.

Chapter 6 contains checklists for specific types and areas of programming which aim to pull together guidance on legal, regulatory and any other issues that may arise. Producers and editorial staff may find it helpful to refer to these checklists first, in order to summarise and clarify what the major issues are likely to be in connection with the particular genre and type of programme they are working on. The checklists direct producers to the

various parts of the Handbook that deal with the relevant issues in more detail.

The Appendices contain a number of helpful and relevant best practice guidelines and protocols referred to in other parts of the Handbook.

Every effort has been made to ensure this Handbook is accurate at the time of publication and updates will be made available on Channel 4's and Five's respective websites. The Handbook is intended as a helpful reference tool and aid to responsible programme-making. It is not intended to replace the need to refer and discuss matters with the commissioning editor for your programme and take appropriate advice from Channel 4's and Five's legal and compliance departments.

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CHANNEL 4'S COMPLIANCE PROCEDURES

1. INTRODUCTION

Channel 4's internal compliance procedures are intended to enable, through best practice and reference-up, the responsible making and broadcast of the boldest and most challenging programmes which can be successfully defended to Ofcom and in the courts where necessary and in which our audience can safely place its trust. To be effective the compliance process must include ALL staff involved in the making and broadcasting of programmes and programme material such as trails, press information and marketing. The process requires knowledge of and adherence to the rules in the Ofcom Broadcasting Code ('the Ofcom Code'), the Independent Producer Handbook ('the Handbook'), including the Viewer Trust Guidelines and other internal guidelines. Also essential is close collaboration between commissioning editors (including deputies, editors, assistant editors, programme executives, editorial administrators and assistants) and programme-makers, input from editorial and compliance managers in all channels and platforms and advice from the programme lawyers in the legal & compliance department. The reference-up process, which lies at the heart of effective compliance, involves editorial heads of department, channel heads and ultimately the Director Of Television & Content and Chief Executive. Also involved in and key to the process of compliance along with the editorial and legal teams, are staff in new media (especially web sites and VOD), creative services, press, the programme planning and strategy departments, media planning, scheduling and marketing departments.

The following internal procedures apply to all programmes commissioned by, purchased for and broadcast on Channel 4 and all its platforms, including E4, More4 and Film4 (including all '+1' catch-up channels) and to material published on

the web. The same essential principles will apply to radio, although some procedures and terminology will vary. There are separate procedures for the digital channels and New Media, including VOD (see reference to these below), which should be read in the light of the over-arching principles in this document. These are available from the legal & compliance department.

It is essential that all editorial staff at Channel 4 read and are familiar with the Ofcom Code and the Handbook as well as these procedures.

2. THE COMPLIANCE PROCESS AND ROLE OF COMMISSIONING

Although the Channel's approach will always be one of collaboration, the cardinal principle is that programme lawyers (and compliance advisers where appropriate) advise and editors decide. In other words, working closely with programme-makers who have their own obligations, commissioning editors, editorial heads, the channel heads, and ultimately the Director of Television & Content and Chief Executive, by a process of 'referral-up', are responsible for the editorial content of the programmes. Crucially this includes making sure that all programmes - in their production and broadcast - have been subject to the appropriate level of scrutiny at every stage to ensure compliance with the Ofcom Code. This includes reviewing co-productions, programmes commissioned or acquired by commissioning editors' predecessors and all repeats on all platforms, in conjunction with the channel's editorial compliance manager.

Editorial staff are also responsible for ensuring that before and after broadcast any matters giving rise to legal issues or requiring legal advice on content issues such as libel, contempt of court and fair dealing are referred to the legal &

compliance department for timely advice. A central aim of the legal & compliance department is creative risk-taking – to enable the broadcast of the boldest possible programmes within legal and regulatory constraints so that they may be successfully defended after broadcast. To best achieve this aim and the creative ambitions of the Channel itself, therefore, a programme lawyer should be consulted and involved at the earliest stages of a project requiring advice and then work closely with the editorial team and programme-makers.

3. THE LEGAL & COMPLIANCE DEPARTMENT

The programme lawyers and compliance advisers in the legal & compliance department are enablers with considerable expertise in dealing with the full range of media law and regulatory compliance issues, dealing with Ofcom on a daily basis. They advise on all content-related legal and compliance issues in the making and broadcast of programmes and other content on all Channel 4 platforms, before and after broadcast. In addition they provide guidance on ethical issues and best practice in relation to the making and broadcast of our programmes.

The programme lawyers in the legal & compliance department are involved in legal and compliance training of internal staff and independent producers, draw up specific guidelines for programmes, series and genres where needed and are instrumental in the robust defence of programme content both where complaints are made to Ofcom and where litigation is threatened. They are also the first point of contact with Ofcom and are involved in proactive lobbying on legal and regulatory changes affecting programme content.

In addition to being easy to find during

office hours by visiting the legal & compliance department, a designated programme lawyer is on call 24 hours a day, 7 days a week ('the duty lawyer'). A duty lawyer memo is circulated at the end of each week and this contains the name of the following week's duty lawyer and their full contact details.

4. THE VIEWERS' EDITOR

The Viewers' Editor's role is to assess and consider audience comments, concerns and views on Channel 4's output from a position of independence within the Channel and to represent these views where appropriate at editorial and legal and compliance discussions. It is also to provide advice and guidance where appropriate, to the Director of Television & Content and channel heads, on decisions to commission and broadcast programmes on behalf of viewers. The Viewers' Editor also acts as an additional sounding board on sensitive or challenging content decisions before and after broadcast, with particular emphasis on the audience perspective. This will include, but not be limited to, content which might cause or has caused significant offence or concern to the audience. They will also act as another level into existing complaint handling, picking up information from many different sources that already exist within the Channel and outside and acting as a source of intelligence on viewers.

The Viewers' Editor can ask, where necessary, the question "why are we broadcasting this?" even where the view of the editorial team and legal & compliance is that it complies with the Ofcom Code. This role is complementary to the pivotal role played by research & insight and the editorial and legal/compliance process. Consulting or briefing the Viewers' Editor where an issue in a programme may cause or has caused a significant audience

reaction will help not only with public accountability but may assist in defending that programme from subsequent complaints to Ofcom. Final editorial control resides with the Director of Television & Content and the Chief Executive.

5. THE ROLE OF OFCOM

Channel 4 is directly accountable to Ofcom under its licence for both the making and the content of all its programmes (including all programme trails). All independent production companies in turn have contractual obligations to comply with the Ofcom Code and the Handbook in their making of programmes and to alert their commissioning editors to potential issues and problems. Ultimately all issues arising under the Ofcom Code relating to the content and making of programmes (and most legal issues) will need to be defended by Channel 4 but the production company which made the programme, and the programme-making team, will play a crucial role in its defence. A serious failure in compliance can result in the imposition of a very heavy fine, a direction not to repeat a programme, a direction to broadcast Ofcom's adjudication on air and even, in the case of all but Channel 4 itself, the shortening or the revocation of a channel's licence. The imposition of a sanction can also be highly damaging both to Channel 4's and its programme-makers' reputation and potentially undermine the audience's trust in our programmes.

Responses to Complaints to Ofcom after Broadcast

If a programme or a trail for a programme attracts significant complaints or otherwise gives rise to concerns, Ofcom may seek the Channel's justification for broadcast and an explanation of how it was felt it complied with the Ofcom Code. This may relate to the programme's scheduling as well as its content and any warnings that

did or did not precede it.

In most cases, a member of the legal & compliance department will draft the reply to Ofcom with input from the commissioning editor (or creative services, if a trail) and, if appropriate, the programme-makers. However, the commissioning editor (or creative services, if a trail) must be able to provide a defence of editorial decisions taken and to assist in preparing the section of the letter relating to this. Ofcom normally allows ten working days for a response but in some circumstances may impose a shorter deadline.

Responses to fairness and/or privacy complaints and more complex standards issues generally entail a significant amount of work and the programme lawyer will need full cooperation and assistance from the programme-makers and commissioning editor who may be required to attend any Ofcom hearing.

6. WHEN A PROGRAMME IS COMMISSIONED OR PURCHASED

When a programme is commissioned or purchased, the commissioning editor is responsible for consulting the legal & compliance department for advice where needed at the appropriate stages. Some programmes will be so straightforward that a programme lawyer will not need to be consulted at all. However, in the case of many programmes likely to give rise to legal or compliance challenges, advice will be needed at a very early stage, in some cases even before the programme is commissioned or acquired.

The commissioning editor must also ask the executive producer or producer to provide assurances that the programme team has adequate experience, ability and resources to enable them to understand

and address the Ofcom Code, and the legal and best practice issues their programme is likely to throw up. Please see the **Viewer Trust Guidelines** for further details of these obligations, including the importance of referral up within the production company and to Channel 4.

The compliance process works best as a collaborative process between the programmes-makers, commissioning editor and the legal & compliance department. Where programme-makers are liaising directly with the programme lawyer, which will quite often be the case, commissioning editors must discuss the advice that has been given with the programme lawyer and ensure that it is properly acted upon.

7. EDITORIAL REFERRAL-UP PROCESS

The editorial 'referral up' procedure is at the heart of creative risk taking and compliance and it exists to ensure that difficult or fine-cut decisions on legal and compliance matters are properly considered by the most appropriately experienced and senior editorial executives and programme lawyers within the Channel and, in the unlikely event of any disagreement concerning the programme lawyer's advice, that this is discussed at a senior level.

The key principle is "if in doubt refer". Initial referral up is by the commissioning editor or deputy or assistant to their editorial head and then to the Channel Head, together with the Controller of Legal & Compliance or one of her deputies. The Channel Head and/or Controller of Legal & Compliance may then take the decision to refer up further to the Director of Television & Content.

On more contentious or significant

programmes and issues, the Director of Television & Content will also inform the Chief Executive for his final decision as Editor-in-Chief. The Chief Executive, in conjunction with Director of Television & Content will decide whether the circumstances are so exceptional that it is necessary to inform the Channel 4 Board.

In addition to the above editorial process, the Controller of Legal & Compliance reports directly to the Group Finance Director on potentially serious legal or compliance risks concerning programme content, legal action taken or threatened against the Channel and serious regulatory action.

See point 8 below for Issues Requiring Reference-up

Difficult and fine-cut compliance decisions

After consideration and advice from the legal & compliance department, where necessary, all such compliance decisions or issues should be referred up by the commissioning editor to the relevant editorial head and, if appropriate, to the Head of Channel 4 (or Channel Head) and ultimately the Director of Television & Content and then Chief Executive. Such matters might concern a significant viewer trust or programme authenticity issue, the inclusion of potentially harmful or offensive material e.g. very strong language, explicit sexual content or graphic violence; or may relate to a difficult ethical, fairness or privacy issue. At the same time the commissioning editor (or programme lawyer) will also refer the matter up to the Controller of Legal & Compliance or one of her deputies.

Where there is disagreement

Compliance issues and advice may give rise to considered discussion but a programme lawyer's advice on legal matters must always be followed, with reference up to the Controller of Legal &

Compliance. If a commissioning editor disagrees with a programme lawyer's advice on a compliance issue it must be referred up to the Controller of Legal & Compliance and Head of Channel 4 (or channel head) and, if necessary, to the Director of Television & Content and then Chief Executive.

8. ISSUES REQUIRING REFERRAL-UP

It is impossible to set out an exhaustive list of issues which require referral-up but the golden rule is - if in doubt, refer. The following list outlines the main areas where timely and appropriate editorial and compliance referral-up before (and in some cases after) broadcast is required:**

- Where there are significant viewer trust issues; **
- Where there are serious questions or concerns about the authenticity of factual material; **
- Apparently dishonest conduct by a member of the production team; **
- Programmes containing material which will potentially cause widespread offence e.g. extreme violence, explicit sexual material, highly offensive humour, material causing significant religious or racial offence or offence to other minority groups;
- Programmes containing the most offensive language;
- Consideration of plans to use Premium Rate Telephone Services (including red button) for voting or competitions, or other forms of viewer interaction;
- Where there are plans to film or record surreptitiously or broadcast such material;
- Where there are serious concerns about the health or safety of programme makers or contributors; **
- Where there are sensitive or ethical issues relating to contributors, particularly those under 18 or vulnerable adults; **
- Projects which involve travel to a

dangerous country;

- Where there are plans to research or film in potentially dangerous situations;
- Where there are plans to provide an undertaking of anonymity to a source (see also point 9 (viii) below);
- Where a potentially contentious programme is relying on a single source;
- Where there are plans for highly controversial figures to appear in programmes;
- Any proposal to grant a preview to a contributor or other third party in unusual circumstances;
- Any proposal to pay a criminal or someone who has engaged in seriously anti-social behaviour for an interview about their crime/behaviour;
- Footage of executions or individuals at the point of death;
- The portrayal of highly controversial figures or events in factual dramas;
- Where there are plans to film entertainment "set-ups" or high profile stunts;
- Any other material which requires a difficult call on a compliance or sensitive ethical issue;
- Programmes in respect of which there is a serious risk or threat of legal action; **
- Where there is serious risk or threat of police action against the programme, programme-makers or a contributor; **
- Where there are plans to enter into a commercial relationship, including for any product or service, with a third party in connection with a programme or programmes, particularly where it is planned to make reference on air to the company and/or products or services;
- An issue giving rise to a significant conflict of interest in respect of the programme makers or Channel 4. **

**Some of the above issues might also arise after transmission of a programme and will therefore require referral-up at that stage and these are denoted with a double asterisk.

9. AREAS OF POTENTIAL CONCERN WITH SPECIFIC PROCEDURES

i) Viewer Trust

Channel 4 has a bond of trust with its audience and a duty to ensure that viewers are not deceived or misled by our programmes (including programme trails and other promotional/press edits). This bond must not be broken and, if it is, the most serious consequences will follow. Programmes must be truthful, accurate and fair and not mislead the audience. Programme-makers must understand the importance of this issue and that they must never stage, construct, reconstruct, re-enact or otherwise fake any scenes of actuality and pass them off to our viewers or to Channel 4 as the real thing.

The importance of viewer trust is not limited to current affairs, documentaries or conventional factual programmes. Simply because a programme is primarily designed to entertain or is 'formatted' does not mean that there is a licence to mislead the audience. Our viewers are entitled to respect and that means they must feel confident that they can take what they see or are told in a programme at face value.

At the heart of the commissioning system, which is central to Channel 4's broadcasting remit, is the relationship between the commissioning team and independent producers. To be effective and to achieve the highest quality programmes, the relationship must operate with honesty, openness and trust. It is important that the commissioning process does not act as a disincentive to programme-makers at any level, inhibiting them from telling Channel 4 if a project is not working.

In addition, it is important that everyone involved in the programme, whether at the production company or the Channel, avoids, even inadvertently, making anyone involved in the production feel they are under pressure to deliver 'results' or to 'hype' the story at the expense of the truth. On rare occasions, halting a project which is not working out (perhaps because the story does not stand up) is the right course of action; inventing the story is never an option and "the show must go on" is not an excuse.

There is an equal responsibility here for footage obtained from a third party as there is for footage shot by our programme-makers.

The Viewer Trust Guidelines, which must be read and followed, set out further practical steps and guidance designed to ensure truth and accuracy in programmes and explain what constitutes acceptable and unacceptable practice. The guidelines contain more detail on these areas:

● **Fact-checking and Accuracy.** A cornerstone of maintaining viewer trust is ensuring that programmes are factually accurate.

● **Editing Interviews.** As well as not misleading the viewer, it is vital that interviews and other contributions, including observational filming, are edited fairly and do not distort or misrepresent the person's known views, position or experience.

● **Hoaxes.** If it seems too good to be true perhaps it is. Make further enquiries as to their authenticity to ensure that you, and hence Channel 4 and the viewer, have not been fooled.

● **Filming Criminals or Criminal Behaviour.** This is an area fraught with difficulty and can lead to authenticity problems.

● Other areas where authenticity issues can arise:

- Use of secret filming
- Use of disguised or anonymous interviews
- Drawing on anonymous sources
- Reliance on uncorroborated claims
- Advertising for contributors
- Payments to participants, especially criminals.

ii) Strong Language

The most offensive language i.e. the words 'fuck' and 'cunt' and their derivatives (e.g. 'fucking' and 'motherfucker'), cannot be used before the 9pm watershed as this would breach the Ofcom Code and must be removed or obscured by bleeping or dipping. This includes the words in written form (including subtitles) and gestures. Any proposed use of the word 'fuck' or any of its derivatives after the watershed should be referred up by the commissioning editor to the relevant editorial head for approval in writing before transmission and arrangements for an on-air warning must be made. A 'swear form' (commonly referred to as a 'fuck form') must be completed, copied to the programme lawyer where appropriate. Because of its greater potential to offend, any proposed use of the word 'cunt' post-watershed should be referred up by the commissioning editor to the Head of Channel 4 or relevant channel and/or Controller of Legal & Compliance, copied to the editorial head, for approval in writing before transmission, following advice from the particular programme lawyer.

Remember: these words and their derivatives must never be broadcast before 9pm in any form.

Note: If the word 'cunt' is to be included within a programme, the warning must refer to "very strong language", rather than merely "strong language".

iii) Suitability for Slot and On-Air Warnings and Flaggings

The Ofcom Code stresses the importance of viewer expectation which includes appropriate scheduling and providing the audience with the necessary clear information to enable informed viewing choices. Commissioning editors are responsible for ensuring that their programmes are appropriately scheduled, edited for their slot (including repeats at an earlier time) and preceded by any appropriate announcements to warn viewers about, for example, strong language, violence, explicit sexual content, flashing images etc. They must consult with a programme lawyer in the legal & compliance department and then liaise directly with the relevant personnel in media planning. An online request form is in the process of being developed to simplify this.

What used to be called "family viewing time" starts at 5.30am and, therefore, material not suitable for pre-watershed transmission, including strong language, must not be broadcast between 5.30am and 9pm. In addition, if there is +1 service the time of original broadcast must take this into account. Specifically, care must be taken with scheduling programmes between 4.30am and 5.30am.

Warnings are not restricted to post-watershed programmes. Sometimes, it will be necessary to provide viewers with information flagging up the content of programmes transmitted before 9pm where, notwithstanding its acceptability for family viewing, some viewers may not wish to watch or wish their children to watch e.g. medical programmes involving surgery, food programmes that show animal slaughter or scenes that very young children may find upsetting. In such cases, commissioning editors should arrange with the relevant personnel in media planning for the content to be

'flagged up' and a draft announcement should be agreed in consultation with a programme lawyer.

Some programmes, pre- or post-watershed, may require a warning into each part or into the part where the potentially offensive material occurs e.g. the word 'cunt' is included in part 3 of a post-watershed programme or a documentary contains particularly graphic images in part 2. Viewer expectation is the key and the programme lawyer will advise on whether an 'into-part warning' is necessary.

All on-air introductions for contentious or sensitive programmes e.g. Dispatches, must be approved by the commissioning editor and the relevant programme lawyer before transmission.

Warnings or flaggings must be clear and explicit. They can be customised but not to the point of losing clarity. They are not a substitute for appropriate scheduling.

Some examples of warnings are:

- "Contains strong language"
- "Contains strong language from the start"
- "Contains very strong language" (for 'cunt')
- "Contains sexual scenes"
- "Contains adult humour"
- "Contains scenes of explicit violence and sexual violence"
- "Contains scenes of human suffering and distress"
- "Contains images of animal slaughter some viewers may find distressing"
- "Contains footage of surgical procedures and some nudity"
- "Contains flashing images"
- "Suitable for adults only" (only with the most extreme material scheduled late)

Live programmes expected to contain, for example, strong language, adult humour or flashing images (such as flash

photography or strobe lighting effects) should also be preceded by an appropriate warning. Please see Live Programmes Procedures.

Where a programme contains strong language in the opening minutes and starts at 9pm, the relevant personnel in media planning should be informed to make sure that it does not start just before the watershed.

iv) Surreptitious or Secret Filming or Recording

All secret filming and recording (including recording telephone conversations for broadcast and where a subject does not realise that a visible camera or microphone is actually recording) must comply with section 8.13 of the Ofcom Code and be warranted (unless it is for entertainment purposes, in which case there are other rules). The term 'secret filming' will be used for ease of reference but it is intended to cover all covert or surreptitious filming or recording. Please refer to and follow the **Rules of Practice and Procedure for Secret Filming and Recording for Channel 4 Programmes ('Secret Filming Rules')**. In outline the following procedure must be followed:

a. Other than in exceptional circumstances, programme-makers must give commissioning editors and programme lawyers at least 2-3 working days notice of an intention to secretly film.

b. Other than in exceptional circumstances, all secret filming will require a written request to be made to and approved by the Head of Channel 4 or the Head of News and Current Affairs or his/her appointee at two crucial stages, (1) before it is undertaken, and (2) before it is broadcast:

1. Before any secret filming is undertaken, the commissioning editor must request permission in writing from the Head of

Channel 4 or the Head of News and Current Affairs, any such request having been seen and approved by the programme lawyer. **A suggested proforma for this written request is appended to the Secret Filming Rules.** Advice from the Controller of Legal & Compliance or one of her deputies should be also sought before submission if one of them is not the programme lawyer advising.

2. Later, if the secret filming has been successful and it is to be included in the programme as transmitted, the commissioning editor must request written permission in writing from the Head of Channel 4 or the Head of News and Current Affairs before it can be broadcast – once again, acting on the advice of the programme lawyer and the Controller of Legal & Compliance (or one of her deputies). **A suggested proforma for this written request is appended to the Secret Filming Rules.**

Note: all written requests to secretly film and stage one and stage two approvals must be copied to the Controller of Legal & Compliance, who keeps a central record, the appropriate programme lawyer (if different from the Controller of Legal & Compliance) and the relevant editorial head.

In addition, commissioning editors and programme-makers must read and follow the **Rules of Practice and Procedure for Secret Filming and Recording for Channel 4 Programmes.** This is appended to the Handbook and available from the legal & compliance department. **Commissioning editors should send this document to all programme-makers contemplating undertaking any secret filming.**

v) Deceptions and Set-Ups and Recordings for Covert Purposes
Programmes which involve set-up

situations, deceiving contributors for entertainment purposes or wherever a subject has consented to be recorded for a purpose other than that intended covertly by the programme-makers, must comply with Sections 7.14 and 8.15 of the Ofcom Code.

In addition, in all such cases, commissioning editors should seek the early advice of the legal & compliance department and where necessary refer-up for approval, both before recording takes place and again before it is broadcast.

vi) Live Programmes

Channel 4 has specific rules contained in the **Live Programme Procedures** protocol, including an apologies procedure where a problem occurs on air, which must be followed. This is appended to the Handbook and available from the legal & compliance department.

Commissioning editors should ensure that presenters of live programmes are capable of dealing with the particular demands of the programme and that arrangements are made at an early stage for legal & compliance briefings and advice from the legal & compliance department. With few exceptions e.g. sporting events, all live programmes must be viewed and monitored by an editorial representative of Channel 4.

If any inappropriate material is inadvertently broadcast live which might be in breach of the Ofcom Code, an appropriate apology must be actioned immediately in consultation with the duty lawyer. The Controller of Legal & Compliance, Channel Head and the Director of Television & Content should also be notified as soon as possible thereafter and a written report of the incident prepared by the commissioning editor without delay. Where material which is potentially legally problematic is inadvertently broadcast, the programme lawyer advising on the show will direct

what action, if any, should be undertaken. In the event a programme lawyer is not watching the show, the editor must call the duty lawyer immediately i.e. while the show is on air.

If there is any use of premium rate services in connection with a live programme, there must be an agreed contingency plan in place, as referred to in the Live Programme Procedures, detailing what is to be done if/when technology fails.

There are additional procedures governing the '+1' time-shifted broadcast services (Channel 4+1, E4+1 and More4+1) which are referenced in the Live Programme Procedures and which are set out in more detail in the relevant Channel Editorial and Compliance Protocols. The procedures cover situations where live programmes are relying on premium rate telephone services that close within the live programme or within an hour of it or where a potentially serious legal issue or potentially serious breach of the Ofcom Code occurs which needs to be obscured before the '+1' repeat.

vii) Programme-Makers Travelling to a Hostile Environment

Before a programme team departs to a potentially hostile environment (even where the programme itself is not a sensitive or controversial one e.g. a holiday programme) and whether or not they are actually filming, the commissioning editor must ensure that the team is adequately experienced and prepared for the trip and that relevant personnel at the production company read and comply with the Checklist for Security Protocol for Filming in Potential Hostile Countries aka **the Hostile Environment Protocol or "CLSP"** (appended to the Handbook and available from the legal & compliance department) and satisfactorily complete a protocol form for that trip. A programme lawyer in the legal & compliance department

will advise on the protocol's completion. The commissioning editor must also ensure that their programme finance manager addresses all necessary insurance issues with the programme team before they depart. Where the nature of the trip, those travelling or the country being visited merit it, the commissioning editor must seek the advice of a programme lawyer and see to it that the programme team are properly briefed on safety issues before they depart.

A surprisingly large number of countries are designated as potentially risky for travel – the Foreign Office web site (<http://www.fco.gov.uk/travel>) has useful and up to date information.

There is a separate protocol outlining the steps to be taken in the event of a kidnapping and the current affairs duty executive and duty lawyer should be contacted immediately.

viii) Undertakings of Anonymity to Sources

If a programme-maker wishes to or has given an unequivocal undertaking of anonymity to a source or interviewee, immediate advice must be sought from a programme lawyer in the legal & compliance department. If the undertaking might ultimately bring the programme maker into conflict with the law and he/she is expecting Channel 4 to be bound by the undertaking, this must be referred up via the Director of Television & Content and Chief Executive to the Channel 4 Board.

10. COMPLAINTS ABOUT PROGRAMMES

Viewer Enquiries respond to the vast majority of calls, emails and letters of complaint about programmes but commissioning editors bear primary responsibility for answering letters of complaint about their programmes where

they raise significant, unusual, complex or otherwise sensitive issues. Replies should be reasonably prompt, duly courteous and appropriate to the issues raised.

If a complaint raises legal, compliance or ethical issues (including those involving viewer trust) they must be discussed with a programme lawyer in the legal & compliance department before reply and referred-up as appropriate. The Viewers' Editor should be consulted where necessary and will assist in accountability where there is a significant reaction to a programme – before or after broadcast – on web sites or forums.

11. THE COMPLIANCE ROLE FOR OTHER DEPARTMENTS

Media Planning

Separate guidelines and protocols (available from the legal & compliance department) set out in detail the procedures to be followed in respect of:

- Programme trails/promotions /launch tapes;
- Presentation announcements;
- On-air warnings and flaggings;
- Legal apologies and corrections;
- Ofcom adjudication summaries;
- Promotions for Programme Support material;
- Appeals;
- Helplines;
- Competitions;
- Phone line details e.g. for voting or solicits for programme contributors.

Warnings and Flaggings

Each day the announcer for each Channel must run all warnings, flaggings and potentially problematic or sensitive announcements for that day past the duty lawyer from the legal & compliance department and record this in the daily 'warnings and flaggings log'.

All relevant staff will be informed who the duty lawyer is for a particular day by a weekly duty lawyer memo, which contains the lawyer's full contact details.

Note: references to the 'presentation department' later in this Handbook are, in the case of Channel 4, intended to refer to 'Media Planning'.

Press Office

The material published by the press office (e.g. press tapes for review purposes and press launch clip tapes) is not regulated by Ofcom but can be the subject of legal action, such as libel, in the same way as programmes and can give rise to viewer trust and other corporate issues. Channel 4 is potentially liable for what newspapers publish on the basis of tapes/DVDs of preview/review copies of our programmes. Programmes may have a range of issues which make pre-broadcast publicity potentially problematic – this may include issues with contributors. It is vital therefore that press strategy for potentially contentious or sensitive programmes is discussed and agreed in advance with the commissioning editor and programme lawyer. All billings and press releases must be seen in advance by the programme's makers and the commissioning editor to ensure they are accurate and to identify any problems. Billings and press releases should also be cleared by the programme lawyer before publication, especially where the programme is in any way contentious or sensitive. The programme lawyer must also be consulted, along with the commissioning editor, before tapes/ DVDs are sent to the press.

There is an agreed protocol covering this often highly sensitive area and copies are available from the legal & compliance department.

Other departments in the channel such as corporate relations or sponsorship may

also put together clip tapes of the channel's programming. Please note that this material is the subject of this agreed protocol in a similar fashion to press material.

Creative Services, Trails and Marketing

All trails must be viewed and approved by a programme lawyer, or in some cases a compliance adviser, in the legal & compliance department, who will advise on any edits required, when the trail can be scheduled and whether, in exceptional cases, a warning is required. The commissioning editor must also view the trail for their programme before broadcast. Normally, for programmes with factual elements the programme maker should also see the trail in advance to identify any problems relating to viewer trust, accuracy or contributors. Marketing for all programmes of a sensitive or contentious nature must be discussed at an early stage with the commissioning editor and the relevant programme lawyer in the legal & compliance department who must approve the final version.

There is an agreed protocol covering this often highly sensitive area and copies are available from the legal & compliance department.

Viewer Enquiries

A separate guide (available from the legal & compliance department) also sets out in detail the procedures to be followed in respect of reference from the viewer enquiries department to the legal & compliance department of communications which potentially raise legal or compliance issues. Where a particularly contentious programme is to be broadcast the commissioning editor responsible should give appropriate advance notice to the viewer enquiries department and, on the advice of the relevant programme lawyer, draft appropriate wording to assist the viewer enquiries department in dealing with calls.

Where a programme is likely to or does give rise to a significant number of complaints the commissioning editor, in consultation with the legal & compliance department and the Viewers' Editor, should draft a standard response to assist the viewer enquiries department in dealing with callers and respond to emails and letters.

Digital Channels

Channels including E4, More4 and Film4 have their own Editorial, Legal & Compliance procedures and reference-up procedures, copies of which are available from the legal & compliance department. In addition, editorial and compliance managers play a key role in the compliance process, including organising compliance for live streaming and reverting of post-watershed shows which are repeated pre-watershed, identifying problems in the schedule and arranging warnings. These procedures should be read in the light of the principles outlined in this document.

New Media

There are separate written and/or established procedures for editorial staff involved in commissioning and producing content for dissemination on all new media platforms, particularly websites (including podcasting), mobile, red button and radio, to ensure that appropriate consultation takes place with lawyers from the legal & compliance department before material requiring advice is published/ broadcast. These procedures must be viewed in the context of the principles outlined in this document and in particular the requirements of the **Editorial Referral-Up** section above.

Detailed guidelines and processes for the conduct of competitions, whether they are entered for free on the channels' websites, or involve a premium rate service, are in place. Similarly, all online and premium rate voting is governed by detailed rules and guidance designed to ensure the

integrity of processes involved.

VOD

Video on Demand ('VOD') is regulated by the Association for Television-On-Demand ('ATVOD') and its code of practice, which must be followed. It is very similar to the Ofcom Code. One of its key provisions is that the Ofcom Code's requirements are adhered to. VOD's Compliance Manager deals with all regulatory content issues in close liaison with the programme lawyers in the legal & compliance department. Important issues include adequate systems for the protection of under 18s, the suitability of programmes for availability on VOD (catch-up and archive have different considerations), the need for carefully worded guidance and warnings and procedures for the take-down of programmes where required. There are special considerations concerning promotional material and clips for the VOD services. Further details are available from the VOD Compliance Manager.

Sponsorship

The sponsorship department should liaise regularly with the legal & compliance department on the suitability of sponsors for particular programmes, as well as the nature and content of proposed sponsor credits. Where appropriate this process must also involve the commissioning editors for the programmes concerned. Commissioning editors must always be made aware by the sponsorship department of sponsorship of any of the programmes for which they are editorially responsible. Any issues should be referred to the legal & compliance department, at the earliest appropriate stage, so that scripts can be considered and potentially problematic material dealt with before any filming takes place.

Channel 4 News

Channel 4 News has its own Compliance Manual and reference-up procedures. Please refer to the Head of News & Current

Affairs or the Controller of Legal & Compliance for more details.

Radio

Radio will have its own procedures and protocols modelled on those in place for television and other visual media. The Ofcom Code also applies to radio and so does the Handbook and these referral-up procedures. References, therefore, to viewers includes listeners to radio programmes.

12. ADDITIONAL GUIDELINES AND PROCEDURES FOR CHANNEL 4 PROGRAMMES

In addition, for many programme series, areas of programme making and programme genres Channel 4 has bespoke guidelines and protocols, many of which are referred to in this document, e.g. best practice rules for Secret Filming, Live Programmes and Filming in Hostile Environments. The key guidelines and protocols are appended to the Handbook and many are available on the 4producers web site. All of these documents are available from the legal & compliance department.

13. CHANGES TO THE OFCOM BROADCASTING CODE, OFCOM GUIDANCE, THE HANDBOOK, GUIDELINES AND PROCEDURES

The legal & compliance department will, from time to time, circulate to staff details, guidance and advice covering any significant changes to the Code, Ofcom Guidance on the Ofcom Code or the Channel's guidelines and procedures since the publication of the Handbook.

**Channel 4 Television Corporation
January 2008**

3

FIVE'S COMPLIANCE PROCEDURES

INTRODUCTION

Five relies on its independent producers to apply the highest standards when making programmes. A failure in this regard could lead to legal action or regulatory intervention. Compliance with the Broadcasting Code and other regulatory rules is a term of Five's Ofcom licences and any breach could lead to a significant fine, a reduction in the length of the licence and even loss of the relevant licence.

Five expects everyone involved in the production and broadcasting of programmes to have an understanding of the compliance process – this includes the Director of Programmes, commissioning editors, Scheduling and Planning, Creative Services and Marketing and Legal and Business Affairs. It is the responsibility of producers to ensure that anyone working on a programme for Five is aware of the importance of legal and regulatory compliance and that they understand these rules and the processes at Five.

The role of 'editorial' and 'legal' – a collaborative process

Programme making and dealing with any repercussions before or after transmission is a collaborative process. However, within that team approach people have different areas of responsibility:

- Commissioning editors 'own' the programmes they commission or purchase and are responsible for the editorial content of the programmes broadcast or repeated. They are responsible for ensuring programmes in their area are suitable for transmission at the time scheduled. This includes programmes commissioned or purchased by their predecessors. Ultimate editorial responsibility rests with the Director of Programmes (or their alternate). Where an editorial decision is of particular significance to the channel a decision may need to be referred up.

- Legal and compliance advisers provide advice and guidance on any legal or regulatory matters. While the primary obligation is to Five and its executives, advice and support will also be provided to producers of our programmes as part of the collaborative approach. Any decision on the content of programmes rests with the commissioning editors and ultimately the Director of Programmes as the most senior programming executive.

For this approach to work it is vital that controllers and producers seek input from legal and compliance at the earliest possible stage of any project requiring advice; the lawyers will not automatically know that advice is needed. **The lawyers do not view every programme transmitted and it is the commissioning editor's responsibility to refer specific concerns to the legal and compliance team.**

VIEWER TRUST

Five takes the relationship with its viewers very seriously as reflected in its Viewer Trust Guidelines. These Guidelines must be read and adhered to by all commissioning editors and producers making programmes for Five. The Guidelines deal both with trust in editorial content and where there is a commercial relationship with the viewer as a customer. There are separate and detailed guidelines for any programme which includes a revenue generating element.

Where a commissioning editor or producer believes there is a possibility of a breach of viewer trust or they have a concern in this area they must raise it during the production process so that the issue can be properly considered and addressed. Five will support this approach by a producer; what is unacceptable is for an issue not to be raised or for Five to be misled in any manner.

A programme is commissioned or purchased – first steps

When a programme is commissioned or purchased (or when an idea is being developed if it is potentially contentious, novel or complicated) it is the responsibility of the commissioning editor concerned to:

- Ensure that the production team involved has the appropriate experience and ability to undertake the project and it understands the legal and regulatory issues which may be involved in a particular programme; and
- Ensure that the relevant lawyer is consulted. Commissioning editors should notify the producers of the identity of the lawyer who will be advising and require them to make contact.

Referral up

The collaborative process also means that difficult or borderline decisions on editorial and compliance issues must be referred up to more senior programming executives and ultimately, where appropriate, the Director of Programmes.

On compliance issues involving editorial discretion, the ultimate decision will be taken by the commissioning editor or, if necessary, the Director of Programmes.

Legal advice must always be followed. If a controller disagrees with the advice on a legal matter it must be referred up to the Head of Content Legal Advice and ultimately to the Director of Programmes.

Particular programme matters

Secret filming or recording – factual programmes

Commissioning editors and producers must ensure that they have read Five's procedures relating to covert filming or recording (see Appendix 8C) and Section 8.13 of the Code – this applies to all recording where the subject is unaware that they are being filmed or where they

believe they are being filmed for a different purpose. The following principles must be adhered to:

- Other than in exceptional circumstances, producers must give commissioning editors and the appropriate lawyer reasonable notice of an intention to secretly film/record. In most cases this should not be less than 48 hours.
- Other than in exceptional circumstances, secret filming should be requested and sanctioned by the Director of Programmes (or another senior programming executive) in writing.
- If it is intended to broadcast secretly recorded material written permission should be requested and given in writing by the Director of Programmes (or another senior programming executive).

Deceptions and set-ups

Programmes which involve set-up situations or where contributors are deceived for the purpose of entertainment should comply with Section 7.14 of the Code. Early advice must be sought from a lawyer and any filming sanctioned by the controller before it takes place and again before broadcast.

Live programmes

Five has a set of guidance notes on how to deal with live programming which producers must read and to which they must adhere (see Appendix 8B).

Live programmes raise different issues and potential risks depending on their content. It is vital that legal advice is sought at the earliest stage of the commissioning of a live programme to ensure that the risks are properly assessed and the appropriate compliance procedure implemented. Where necessary, the programme lawyer will provide briefings for all those involved with a live broadcast.

Commissioning editors must satisfy themselves that production teams and presenters have the appropriate experience to deal with the particular demands of live broadcasting.

Factual programmes

Producers are responsible for ensuring that factual programmes are accurate and do not mislead viewers. They may be required to provide evidence in support of particular assertions in a programme and it is vital that producers collate and maintain evidence in support of their programmes in the event of legal or regulatory dispute after broadcast.

Swearing and offensive language

The inclusion of offensive language (including “fuck” and any of its derivatives) in any commissioned programme must be approved by the commissioning editor responsible.

Where the context of the language could cause particular offence (for example, racist language or the swearing is aggressive or repetitive) or the word “cunt” is used, this should usually be referred to the Director of Programmes.

On-air warnings and viewer information

The Ofcom Broadcasting Code stresses the importance of warnings and information so viewers can make informed viewing decisions. Whether a programme requires a warning/viewer information will normally be considered by the compliance viewers. Any warning/viewer information should be agreed by the commissioning editor and the appropriate lawyer.

It should be noted that warnings and viewer information are not restricted to post watershed programmes. Pre-watershed programmes may contain content which is not to everyone’s taste or which parents may feel unsuitable for very young children.

Commercial involvement in programme making

Producers must not enter into any commercial relationship with third parties where their products or services are featured in a programme or where they meet some or all of the costs of making a programme or they provide goods and services for the production for no payment or less than market rates without first discussing this with the commissioning editor and the legal and compliance team. This type of activity could give rise to a serious breach of the Code and complete transparency between producer and Five is required in this area.

**PROGRAMMES
CONTAINING
ANY REVENUE
GENERATING
ELEMENT**

Any programme containing a revenue generating element requires specialist and detailed advice to ensure that it complies with the law as it relates to competitions. Further, the Broadcasting Code and the PhonepayPlus Codes will apply to issues around the provision of charging information and the fairness of any competition or voting mechanism. This is also a key area where viewer trust is paramount and as such it is vital that commissioning editors and producers are aware of and understand both the Checklist on The Use of Telephony Services (Chapter 6G) and Five’s Viewer Trust Guidelines (Appendix 8A).

**DIGITAL CHANNELS,
ON-LINE, ON DEMAND
SERVICES AND
NEW MEDIA**

Programmes may be broadcast or made available not only on Five but also on other channels owned or controlled by Five or via the internet or mobile platforms. When producing programmes careful

consideration needs to be given to issues such as the following:

- Is the subject matter of the programme time sensitive which means that showing the programme over a period of many months or years could lead to legal problems (for example, defamation or contempt of court) or regulatory issues (for example fairness)? Potential problems in relation to the content of programmes shown repeatedly over long periods of time need to be addressed during the production process.
- Do contributors understand how a programme could be exploited through multi-channel broadcasts and on other platforms?

**PROMOS AND
MARKETING
ACTIVITY**

Promos for programmes often take material out of context and seek to market the programme in order to attract as many viewers as possible. Where programmes are particularly sensitive the Creative Services Department need to be given as much information as possible by the commissioning editor or the producer in relation to any particular concerns about the content of promos or when they are scheduled. These considerations may also apply to any off-air marketing activity which commissioning editors and producers should address.

PRESS

Programmes may generate considerable positive or adverse press interest. Commissioning editors and producers should ensure that the Press Office is made aware of any particular issues which may impact on any press activity around a programme. Where necessary, the Legal and Compliance Department should also

be involved in any press activity where legal advice may be required either before information is issued to the press or following publication of any article.

SPONSORSHIP

Five is responsible for the sponsorship of programmes. The commissioning editor must be made aware of any sponsorship of a programme. The content of programmes can affect the sponsor permitted to be associated with a particular programme.

**VIEWER ENQUIRIES
AND COMPLAINTS**

Viewer enquiries received by Customer Services

Five’s Customer Services will refer to the Legal and Compliance Department any enquiries received on which advice is required in order to reply or where a complaint appears to be serious. Where a significant number of complaints are received the commissioning editor and the appropriate lawyer should provide a response before any reply is sent out.

Viewer enquiries received by producers

If a producer receives any viewer enquiry they should draft a response and copy this to the commissioning editor responsible and the programme lawyer for approval.

More serious complaints or threats of legal or regulatory action

These types of contact received by Customer Services will always be referred to the Legal and Compliance Department and the relevant commissioning editor. If a producer receives a complaint from a contributor or other person involved in the programme or any allegation of infringement of a person’s rights or a threat of legal or regulatory action this must be referred immediately to the Legal and Compliance Department and the relevant commissioning editor. Who will be responsible for responding

will then be agreed between the producer and Five.

issue or the Head of Content Legal Advice if it is a legal or compliance matter.

CONTACT WITH OFCOM OR ANY OTHER REGULATORY BODY

January 2008

Commissioning editors and producers must not contact Ofcom about a programme content matter without first seeking advice from the Legal and Compliance Department.

In the event that Ofcom investigates a programme the producer and the commissioning editor may be required to provide detailed justification for a particular programme. The first draft of any response to Ofcom will usually be prepared by the appropriate lawyer for review by the producer and approval by the commissioning editor.

OUT OF OFFICE HOURS LEGAL ASSISTANCE

The lawyer assigned to a particular programme will be responsible for providing any legal advice or assistance out of office hours. 24 hour contact details may be provided where appropriate. In the event that a particular lawyer is unavailable commissioning editors and producers can contact one of the other lawyers.

WORKING WITH FIVE

Programme making for Five should be a positive and collaborative process for all concerned. Producers should feel that they have the appropriate support and guidance from the channel to be able to undertake their role to the highest standard. In the event that a producer has any concerns about the working relationship with Five they should refer this to the Director of Programmes if it relates to an editorial

4

OFCOM BROADCASTING CODE

4A. PROTECTING UNDER 18s & HARM AND OFFENCE

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KEY POINTS

- Under 18s must be protected from potentially harmful and offensive material. One of the main ways of achieving this is through the appropriate scheduling of programmes.
- The watershed is 9 pm. Nothing unsuitable for children should, in general, be shown before 9pm or after 5.30 am. After 9 pm, there should then be a gradual transition to more adult material, not an abrupt change. Generally, the more adult in nature a programme is, the later in the schedule it should appear.
- Potentially harmful or offensive material includes strong language, violence, sexual behaviour etc.. Its inclusion must be justified editorially and by the context i.e. taking into consideration the editorial content of the programme, its scheduling, the audience's likely expectations, any warning that has been given etc.
- Audience expectation is key. Viewers should be clearly forewarned of any potentially harmful or offensive material so they can make their own informed choices about what they and their children watch. This usually requires clear on-air pre-transmission warnings.
- Programmes must be true and accurate. It is the responsibility of programme-makers and broadcasters to ensure that viewers are not misled.
- Programmes should not condone or glamorise violent, dangerous or seriously anti-social behaviour, especially where it is likely to encourage others to copy such behaviour.
- Any discriminatory treatment or language e.g. on grounds of age, disability, gender, race, religion, beliefs and sexuality must be justified by the context. Nothing transmitted should be intended to stir up racial hatred or, taking into account the circumstances, be likely to do so.
- Programmes should show respect for human dignity. In news and factual programmes, showing people in distress and in sensitive situations requires clear editorial justification. Similarly, in entertainment programmes, careful consideration must be given to humour based on the plight or misfortune of individuals, which again must be justifiable editorially and by the context.
- Programmes including exorcism, the occult and the paranormal will require careful handling.

INTRODUCTION

We aim to provide challenging, distinctive, quality programmes to serve our audiences and are constantly looking for new ways in which to inform and entertain viewers. Inevitably, therefore, some of our programmes will deal with difficult or controversial subjects which will not be to the tastes of all viewers and may cause offence to some members of the audience.

Ofcom's Code is designed to ensure that generally accepted standards are upheld in television programmes in order to protect members of the public from harmful or offensive material. Section 1 of the Ofcom Broadcasting Code ("the Code") deals specifically with protecting under 18s whilst Section 2 deals with issues of "harm and offence" generally. This replaces the old concept of "taste and decency". Since these two sections of the Code must be read together, they have been combined in this Handbook into one chapter, although the rules relating to the protection of under 18s are highlighted at the start.

As responsible broadcasters, our primary aim is to protect viewers appropriately, particularly under 18s, from potentially harmful and offensive material, whilst recognising the importance of freedom of expression, together with the right of our audience to receive information and ideas as freely as possible. We seek to follow the principles and comply with the rules in the Code and the key to this is assessing audience expectations. This includes scheduling material responsibly, providing viewers with information about potentially harmful or offensive material through the use of clear and specific warnings, to enable viewers to make informed choices, and ensuring that the broadcast of difficult and challenging material can be justified editorially and by the context.

PROTECTING UNDER 18s

[See Section 1 of the Code at page 8]

The Code places particular emphasis and importance on protecting under 18s i.e. both viewers and those involved in programme-making. Below is a summary of the relevant rules, some of which are considered in more detail later in the chapter. Key amongst these is the proper application of the 9pm watershed.

SUMMARY OF RULES

Material that might seriously impair the physical, mental or moral development of people under 18 must not be broadcast

This rule prohibits the broadcast of the most potentially harmful and offensive material at any time e.g. very explicit sexual practices, obscene material, very graphic violence, etc.

Broadcasters must take all reasonable precautions to protect people under 18

This rule reflects the importance given to protecting non-adult viewers, a reminder to broadcasters that they must always consider carefully the potential effect of their programming on younger viewers.

Programmes should be scheduled appropriately

In addition to the above, programming must be appropriately scheduled in order to protect children. Children are defined in the Code as those under 15 years of age. For more on 'appropriate scheduling' see 'Scheduling & the Watershed' below.

Alcohol, smoking and drugs

These must not be featured in children's programmes without strong editorial justification. In other programmes before the watershed, they should generally be avoided and, in any case, should not be condoned or glamorised unless there is

editorial justification. In programmes likely to be seen widely by under 18s at any time, alcohol, smoking and drugs should not be condoned, encouraged or glamorised unless there is editorial justification.

Violence and dangerous behaviour

Violence must be limited appropriately before the watershed. If it is easily imitable and potentially harmful or dangerous, it must not be included in children's programmes unless there is strong editorial justification. In other programmes before the watershed, such behaviour must not be included unless there is editorial justification. Similar rules apply to dangerous behaviour that is easily imitable and potentially harmful. For further explanation see 'Violence and Dangerous Behaviour' later in this chapter.

Offensive language

The most offensive language e.g. "cunt", "motherfucker", "fuck" or derivatives of these words must never be included in programmes (including in written form) before the watershed. Other potentially offensive language and gestures (e.g. the 'V' sign) must always be justifiable by the context. However, children's programmes should not include offensive language except in the most exceptional circumstances. For further explanation see 'Offensive Language' later in this chapter.

Sex and nudity

Representations of sexual intercourse should not be included before the watershed unless there is a serious educational purpose. Any other portrayal of sexual behaviour or discussion about sex before the watershed should be editorially justified and appropriately limited and inexplicit. Nudity before the watershed must be justified by the context. For further explanation see 'Sex and Nudity' later in this chapter.

Exorcism, the occult and the paranormal
Demonstrations of these practices must not be shown before the watershed.

Paranormal practices which are for entertainment purposes, as opposed to those which purport to be real, can be shown before the watershed but not when significant numbers of children are likely to be watching. These rules don't apply to drama, film and comedy. For further explanation see 'Programmes Including Exorcism, the Occult and the Paranormal' later in this chapter.

Acquired films

There are specific rules relating to the scheduling of films that have been classified (or refused classification) by the British Board of Film Classification. For further explanation see 'Acquired Material' later in this chapter.

Under 18s involved in legal proceedings

Where programmes make references, whether directly or indirectly, to legal proceedings involving people under 18 and there are statutory or other legal restrictions preventing their identification, broadcasters must ensure that they do not inadvertently, or otherwise, give clues which may lead to their identification. In addition, when referring to pre-trial investigations into alleged criminal offences, broadcasters must pay particular regard to any potentially vulnerable under 18s that may be involved, before a decision is made to identify them or to divulge certain details about them. This applies not only to defendants or potential defendants but also to victims and potential witnesses.

Under 18s in Programmes

Due care must be taken over the physical and emotional welfare and dignity of people under 18 taking part in programmes, irrespective of their parents' consent. People under 18 should not be caused unnecessary distress or anxiety by their

involvement in programmes or by their broadcast.

Prizes in children's competitions must be appropriate to the age range of both the target audience and participants.

See 'Programmes Involving Under 18s' Checklist at chapter 6.

SCHEDULING AND THE WATERSHED

The main way in which under 18s may be protected from potentially harmful and offensive material is through the appropriate scheduling of programming. In practice this means that, as a general rule, the more adult in nature the content is, the later it should be broadcast, with the 9pm watershed being the crucial point in time before which material unsuitable for children (defined in the Code as those under 15) should not generally be broadcast. Leading up to and after the watershed, parents are expected to take increasing responsibility for their children's viewing.

Some content may be considered so potentially harmful and offensive (e.g. material that "...might seriously impair the physical, mental or moral development of people under 18") that it should never be broadcast on television e.g. scenes condoning sexual violence, very explicit sado-masochistic practices.

SUMMARY OF RULES

● Children should be protected from unsuitable material by appropriate scheduling (see below).

● The watershed is 9pm. Nothing unsuitable for children should, in general, be shown before 9pm or after 5.30am.

● There should be a gradual transition to more adult material from the watershed, not an abrupt change.

● Broadcasters should clearly 'flag-up' or warn audiences when programmes before the watershed contain material that might distress some children e.g. surgical procedures. Note, however, this is not a substitute for appropriate scheduling.

Appropriate Scheduling

The Code acknowledges that there are a number of factors which determine whether a programme is appropriately scheduled or not. These factors include:

● the nature of the content e.g. whether it's frightening, distressing, gory, sexually explicit, contains strong language etc.;

● the nature of the particular programme e.g. it might well be appropriate to schedule a futuristic, science-fiction series containing comic book violence at a time when large numbers of young children are watching but not to schedule a soap opera containing domestic violence which is more realistic and 'close to home';

● the likely number and age range of children watching, taking into account school time, weekends and holidays e.g. a discussion about sexual matters that might be inappropriate in a breakfast or teatime show, when large numbers of young children are likely to be watching, might well be defensible during term time, in a mid-morning or mid-afternoon discussion programme, when most children are at school;

● the start and finish time of the programme e.g. a movie scheduled to start at 8pm and end at 9.30pm, which had generally mild content throughout until the final scene, which contained very graphic violence would be unlikely to be appropriately scheduled. Although this

scene would not transmit until after the watershed, because the film started well before, it would be likely to have attracted a significant number of younger viewers, including children, who would stay with the film until its conclusion;

● the likely expectations of the audience for a channel at a particular time on a particular day e.g. to schedule a drama about teenage sexuality in a slot normally reserved for cartoons aimed at very young children, may surprise and upset audiences. Furthermore, Channel 4 and Five audiences may expect to see stronger material at, say, 9pm than is shown on BBC1 or ITV1 at the same time.

Gradual Transition

The Code stipulates that in evening television schedules there must be a gradual progression towards more adult material. To coin a well-used phrase: "9pm is a watershed, not a waterfall". The most adult material, therefore, should be reserved for well after the watershed. Content that might still be problematic at 9:30pm might be perfectly acceptable at 11pm or even earlier e.g. at 10.00pm.

There is no requirement that there should be a gradual progression towards less adult content as schedules approach 05:30 am. However, it is advisable not to show the most adult material immediately before 5:30am as, immediately thereafter, programmes must be suitable for family viewing. Please note that Channel 4, E4, More4 and Film4 all have time shifted (+ 1) versions. This means that effectively the watershed will end at 04:30 am.

Programmes Starting at 9pm

Care needs to be taken with programmes that start actually on the watershed, at 9pm, particularly towards the beginning of the programme. Sometimes programmes scheduled to start at 9pm actually transmit a couple of minutes early which might

mean that some adult content (e.g. use of the strongest language) is technically broadcast before the watershed. For this reason, any programmes containing adult material in the opening minutes and scheduled to start at 9pm should be flagged up to the Presentation Department, so that it can ensure that the programme does not start before the watershed.

Flagging Up Content Pre-Watershed

At first sight, this provision might appear to be inconsistent with the principle that, in general, nothing unsuitable for children should be shown before 9pm. However, it merely anticipates that there will be occasions where some content which is not unsuitable for children generally may nevertheless still cause distress to some e.g. younger children may be upset by scenes of an injured animal having to be put down or scenes in a daytime programme showing a surgical procedure.

On-Air Warnings

Prior warning about challenging and potentially offensive content in programmes will have a bearing on the audience's expectations and, in turn, whether viewers consider particular material to be justified (see 'Context' below). Whether or not a particular programme requires an on-air warning e.g. for strong language, violence or sexual content, depends on a number of factors, in particular the time at which the programme is transmitted.

Wherever it is considered that an on-air warning is required (which may be following advice from the programme lawyer), the commissioning editor responsible for the programme should seek advice from the programme lawyer and arrange with the presentation department for a suitable warning to be given. For some stronger or more exceptional material, a flagging or warning into each part may be helpful. Also see

Channel 4's and Five's Compliance Procedures above at chapters 2 and 3 respectively.

Where a programme starts before the watershed but continues after it, it may be necessary to broadcast a warning into the first part after the watershed and, if appropriate, any following parts, if they contain adult material it is considered necessary to warn audiences about.

Programme Trailers & Promotions

Like advertisements, audiences normally come across trailers and promotions without any prior warning and, therefore, any expectation of what they are about to see. For this reason and because viewers can't generally be forewarned about the content of promotional material e.g. that it contains strong language or sexual content, particular care is required both in relation to the content and the scheduling of such material. Potentially offensive material in trailers and promotions is more likely to surprise and therefore offend viewers and should generally be avoided. If in doubt about the suitability of any content of programme trailers or promotional material, please seek advice from a programme lawyer. Channel 4 has a protocol for the clearance of trails and promos. Copies are available from the legal and compliance department.

HARM & OFFENCE

[See Section 2 of the Code at page 16]

GENERAL PRINCIPLES

Editorial Justification & Context

In relation to issues of 'harm and offence', regulation has moved away from the more prescriptive approach of old. Rather than attempting to dictate to broadcasters what is and what is not acceptable, broadcasters are now encouraged to think more carefully about the expectations of their audiences and providing viewers with more information, so they are able to make their own informed choices about what they watch.

Material that may be harmful or cause offence must be justified editorially and by the context, which is determined by a number of factors, including:

- the editorial content of the programme(s) or series - literally, what it is the viewer is seeing and hearing, the tone, the genre etc.
- what channel the material is on - generally viewers expect to see more challenging material on Channel 4 and Five than on say BBC1 or ITV but their expectations of, for example, MTV may be different.
- when the material is broadcast - is it after the watershed, well after the watershed or before? Is it during school time or not, or on a day of particular religious or cultural significance?
- what programme precedes or follows the programme in question - for example, does the programme in question follow an animation, which is likely to have attracted large numbers of young children?

● the degree of harm or offence likely to be caused by the material - this, of course, is not an exact science but editorial and legal & compliance department staff must take a view, based on experience, precedent and common sense.

● the likely size and composition of the potential audience - this can be estimated from both research and experience.

● what the audience's expectations are likely to be - again, estimated from experience, research and common sense.

● the extent to which viewers can and have been informed of the content in advance - clear on-air announcements are the best way of forewarning viewers about difficult or potentially offensive content, though pre-publicity and listings may also be taken into account.

● the effect of the material on viewers who come across it unawares - no matter how clearly viewers are warned, some are always going to switch on their television sets with no prior knowledge of what they are watching and not having seen any on-air warnings or announcements.

Where specific regulatory rules do exist in relation to potentially harmful or offensive material, these tend to relate to programmes broadcast before the watershed, specifically in order to protect younger viewers in the audience. See "Protecting Under 18s" and "Scheduling and the watershed" earlier in this chapter.

Viewer Trust: Truth, Accuracy & the Importance of not Misleading the Audience

Channel 4 and Five take the issue of viewer trust very seriously. Viewers are entitled to expect that programmes are accurate and true and the audience must not be misled.

This obligation applies to all types of programming – including entertainment, with factual elements. Portraying real events, whether in documentary, features, factual entertainment, drama or any other programme, which the viewer is entitled to take at face value, must respect truth and accuracy.

Programme-making is a creative rather than literal medium and has always been more sophisticated than the simple recording of action in real time. However, though the editing process will inevitably condense events which have occurred over a period of time, this must not be at the expense of distorting reality and misleading viewers.

The accuracy and truthfulness of programmes has been the subject of significant media and regulatory scrutiny and raises issues of the utmost importance. If it is claimed or suggested that footage is actuality, then that is what it should be; if it is not, then that should be made clear to viewers.

It is never acceptable to represent as having happened something that did not. It is the responsibility of broadcasters and producers to ensure that viewers are not misled. Ofcom can impose the most serious sanctions for programmes that materially mislead audiences and Channel 4 and Five will not hesitate to take appropriate action against programme-makers who mislead our viewers.

Never stage, construct, reconstruct, re-enact or otherwise fake any scenes of actuality and pass them off to the broadcaster and/or viewers as the real thing.

Accuracy in relation to all aspects of factual programming is vital to ensure we maintain viewers' trust. For example, in addition to scrupulous fact checking and labelling, where necessary, the qualifications, experience and other

credentials of contributors, presenters and experts who appear in factual programmes must be checked and properly verified. Potential contributors should not be taken at face value. If they claim to have particular qualifications or expertise this must be corroborated.

All of Channel 4's and Five's programme-makers are contractually obliged to read and follow the broadcasters' Viewer Trust Guidelines – see Appendices.

Not Condoning or Glamourising Violent, Dangerous or Seriously Anti-social Behaviour

Programmes must not include material that, taking into account the context, condones or glamorises violent, dangerous or seriously anti-social behaviour and is likely to encourage others to copy such behaviour.

VIOLENCE & DANGEROUS BEHAVIOUR

Violence can take many forms and be present in all types of programming e.g. in news programmes, documentaries, in television dramas, in movies, in clips of movies that are being reviewed on magazine shows, even in live or pre-recorded talk shows where contributors lose their tempers. In all cases, whether or not material is suitable for inclusion will depend largely upon the context in which it is shown.

Before the Watershed

● Before the watershed, scenes in programmes showing violence and its after-effects, including verbal descriptions of violence and sound effects, must be "appropriately limited" to reflect the fact that children may be watching.

● Any violence should also be justifiable by the context, based on the factors

described above. For example, is it historical or fantasy-style violence e.g. pirates or space ships being blown up, or more realistic e.g. contemporary people being attacked in their home, that viewers are likely to find more disturbing? Is the violence real or acted, or even animated? Does it feel gratuitous? Is any pain and suffering shown and, if so, to what extent? Is the material being broadcast when large numbers of young children are likely to be watching?

● The inclusion of any scenes of violence that are "... easily imitable by children in a manner that is harmful or dangerous..." before the watershed is prohibited unless there is "editorial justification" and, in the case of children's programmes, i.e. those made primarily for children, must not be broadcast unless there is "strong editorial justification". Often such justification will be that the storyline makes it clear that the violent actions or behaviour that are included are unacceptable, with the perpetrators getting their just rewards.

● Similarly, in relation to "dangerous behaviour", any dangerous behaviour before the watershed which is "... easily imitable by children in a manner that is harmful ..." must not be included unless there is "editorial justification" and, again, in the case of children's programmes, unless there is "strong editorial justification". Often such justification will be that the storyline makes it clear just how dangerous the particular activity is and, therefore, is more likely to deter children from copying the acts, rather than encourage them. However, this may not always be enough and great care should be taken where the potentially dangerous behaviour involves readily accessible domestic items or appliances e.g. knives, tools, washing machines or microwaves.

● For obvious reasons, scenes of violence, particularly of a severe nature, tend to be

reserved until after the watershed. However, viewers are accustomed to and do not generally object to seeing mild violence in programmes before the watershed, if it is handled responsibly.

Violence in many forms is regularly included in some of the most popular pre-watershed programmes e.g. arguments, fights, domestic violence, violent crime and murder all regularly feature in many popular pre-watershed soaps. However, images of actual physical violence in such programmes are invariably kept brief and non-graphic. Normally, it is the lead up to the violence and the resolution that is shown rather than the actual violent acts. Showing pain and suffering is generally avoided in pre-watershed programmes or is strictly limited, as this tends to distress viewers most. Understandably, blood and gore, especially in a violent context, are kept to a minimum before 9pm.

After the Watershed

● The inclusion of scenes of violence (real or simulated) should always be justifiable by the context, based on the factors outlined earlier in this chapter.

● Violence can take many forms with some having an increased potential to cause offence. For example, real violence in a documentary may shock or offend an audience more than the same act being portrayed in a fictional drama. Similarly, violence occurring in a setting that viewers are accustomed to and normally regard as safe e.g. in the home, at school etc. may increase its impact.

● Violent scenes, whether real or simulated, which focus on the pain and suffering of the victim, particularly if graphic and prolonged, are likely to be more distressing and potentially offensive than violent scenes that are more action-based, as in so-called 'action films'. At the same time, normally a balance should be

struck between showing the after effects of violence and not showing unduly distressing scenes of pain and suffering, as it may be irresponsible to show some violent acts without showing the consequences i.e. the injury, damage or suffering.

- Scenes of violence where there is some disparity of power between the perpetrator and the victim or where the victim is vulnerable and unable to fight back or protect him/herself for some reason e.g. male violence against women or children, or group violence against an individual, are likely to have a greater impact on audiences and potentially cause more offence and distress to viewers than violence between equals.

Sexual Violence

- Verbal references to sexual violence e.g. in news or factual programming, both before and after the watershed are unlikely to be problematic if handled responsibly and justified by context.

- The visual representation of sexual violence requires special care and only rarely will it be appropriate for inclusion in programmes before the watershed. Where it is, scenes and images should be appropriately limited and non-graphic.

- Even well after the watershed, the subject of sexual violence requires very careful handling. What is included must be justified editorially and by the context and viewers should be clearly forewarned about what they are about to see. Programmes should never appear to condone or excuse sexual violence.

Any programmes featuring or referring to sexual violence, particularly those scheduled to transmit before the watershed should be referred to the legal and compliance department as early as possible and, in the case of drama, certainly before the scenes in question have been shot.

Suicide & Self-Harm

Depictions of and references to suicide and self-harm (verbal or visual) require careful thought and handling. Particular care must be taken if the method of committing suicide is shown. The Code states that "... methods of suicide and self-harm must not be included in programmes except where they are editorially justified and are also justified by the context".

For programmes dealing with the subject of suicide, careful thought should be given as to whether it would be appropriate to seek professional advice on how it is being handled and how it might be perceived by vulnerable viewers. Thought should also be given as to whether or not certain information, such as a helpline number, should accompany the programme.

Any such programmes, particularly those scheduled to transmit before the watershed should be referred to the legal and compliance department as early as possible and, in the case of drama, before any scenes portraying suicide have been shot.

OFFENSIVE LANGUAGE

Many people are offended by the use of strong language, particularly if its use appears gratuitous. Whether or not audiences consider such language to be justified again turns on a consideration of the context in which it appears, based on the usual factors. In addition, the Code contains some specific rules in relation to offensive language within programmes before the watershed. See also 'Programme Trailers and Promotions' earlier in this chapter and Channel 4's and Five's Compliance Procedures at chapters 2 and 3 respectively.

Before the Watershed

- It is a well-established rule that "the most offensive language" must not be

broadcast before the 9pm watershed. This means the words "cunt", "motherfucker" and "fuck" and derivatives of these words e.g. "fucking". They must, therefore, be edited out, bleeped or the sound dipped so that the word is completely obscured. Exceptionally, it may also be necessary to obscure the speaker's mouth where the word is very clearly mouthed straight to camera.

- Other less offensive language e.g. "shit", "bugger" etc. must not be used before the watershed unless it is justified by the context and would not exceed viewers' expectations but, in any event, "... the frequent use of such language before the watershed should be avoided".

- In programmes aimed specifically at younger children, offensive language should only be included in the most "exceptional circumstances".

There exists an unofficial but well-known classification of words which have been ranked according to their potential to cause offence. This was based on research carried out by previous television industry regulators. For example, research showed that the word "bastard" is generally deemed to be offensive and thus, if it is to be included in programmes before 9pm, which it occasionally may be, its use must be clearly justifiable.

A word like "bloody", on the other hand, is generally deemed to be relatively inoffensive and its inclusion, even in a programme watched by large numbers of children, would be unlikely to offend most viewers. However, as noted above, broadcasters must have regard to the 'cumulative effect' of casual swearing. For example, the inclusion of two or three instances of relatively inoffensive words in a half-hour show at teatime might be considered acceptable, but add to that a couple more within the same programme

and that may well cross the line - not because any one individual word is, in itself, unacceptable but because, cumulatively, the frequency of such language would exceed viewers' expectations.

After the Watershed

- After 9pm, whether or not offensive language is justified will depend largely on the audience's expectations and the context e.g. the word in question (how offensive it is), how it's being used (descriptively, as an insult, aggressively, as vernacular etc.), the nature of the programme, time of broadcast etc..

- Generally, frequent use of very strong language e.g. "cunt" or "motherfucker" should be reserved for later in the schedule. However, use of the word "fuck", including its liberal use, is less likely to cause widespread offence even in programmes starting right on the watershed, as long as there is strong editorial justification and viewers are properly forewarned. For programmes that are scheduled to start actually at 9pm, it may be preferable that the use of strong language is avoided in the opening minutes of the programme. See 'Scheduling and the Watershed' earlier in this chapter.

- Because of its potential to cause widespread offence, use of the word "cunt" requires exceptional justification. In practice, its inclusion is rarely justifiable in any programme close to the watershed and, in particular, before 10pm. Even later in the schedule, it requires exceptional justification.

- Profanities e.g. "Jesus", "Christ Almighty," cause offence to many at whatever time of day they are broadcast and, if included, should be editorially justified bearing in mind the context.

- Profanities coupled with other highly offensive language e.g. "Jesus fucking

Christ” tend to cause widespread and serious offence. In the vast majority of cases, such expressions will be unacceptable at any time and will need to be removed either by ‘dipping’, ‘bleeping’ or editing out the sequence altogether.

● When ‘bleeping’ or ‘dipping’ the sound to disguise an offensive word, generally the entire word should be obscured, not just part of it. In addition, if the programme in question is transmitting before the watershed and, in spite of the fact that offensive language has been ‘bleeped’ or ‘dipped’, it is still very clear what the person is saying, it might, in exceptional circumstances, be appropriate to cover the mouth of the person uttering the offensive language with some sort of visual device. Note: this will rarely be necessary and should only be considered where the word is clearly mouthed straight to camera.

SEX & NUDITY

The inclusion of nudity, sexual behaviour, sexual imagery and references to sex should be editorially justified and defensible by the context in which they appear.

Before The Watershed

● Visual and verbal references to sex and matters related to sex should be editorially justified and appropriately limited and inexplicit.

● Representations of sexual intercourse must not be shown unless there is “... a serious educational purpose”. This means the actual act of sexual intercourse, both real and where it’s portrayed i.e. acted, as opposed to other sexual behaviour.

● The inclusion of nudity and all references to sexual acts, verbal and visual, must be justifiable by the context. What is acceptable in a mid-afternoon,

discussion programme aimed at adult women may well not be suitable for inclusion in a Saturday morning magazine show, which attracts large numbers of children. In addition, the way in which material is presented i.e. serious, flippant, crude etc. is likely to be a major factor in determining whether it is suitable or not.

It is most unlikely that any graphic sexual images or any explicit descriptions of sexual activity will be acceptable in pre-watershed programmes unless the programme has a serious educational purpose and, even then, any such material would require very careful thought and care.

So whilst, for example, showing inexplicit acts of foreplay e.g. kissing, is unlikely to be problematic in most pre-watershed programming, more overtly sexual activities e.g. foreplay involving genitalia or showing nudity, oral sex, masturbation, intercourse etc. is very unlikely to be suitable for a family audience. Even if the sexual activity is happening off camera and so out of view to the audience, it may still be too suggestive for transmission before 9pm, if it is clear what is happening.

Before the watershed, verbal references to sexual activity should be kept relatively inexplicit. Mild innuendo and oblique references to sex are more likely to be acceptable than comments or descriptions that leave little to the imagination or are merely crude.

Nudity in a sexual context is unlikely to be acceptable before the watershed unless strictly limited, whereas nudity in the context of an item about health or education e.g. a beauty treatment or medical examination, is less likely to exceed viewers’ expectations, for obvious reasons, although a flagging should be considered. Full frontal nudity (both male and female), even in a non-sexual context, is unlikely to be acceptable before the watershed, unless

there is a serious educational reason for showing it. Less explicit nudity, however, e.g. above waist nudity, catching a brief glimpse of someone from behind getting out of the shower, naturism, topless sunbathing etc. is unlikely to be problematic as long as it is editorially justified.

After the Watershed

● The inclusion of nudity and all references to sexual acts, verbal and visual, must be justifiable by the context.

After the watershed, it may be possible to justify the broadcast of explicit nudity and scenes of an explicit sexual nature, with the most explicit material being transmitted later in the schedule i.e. well after the watershed. Again, viewers’ expectations will be determined largely by the context in which the material appears and whether they have been properly forewarned.

However, even the most explicit material on terrestrial channels like Channel 4 and Five will not be as graphic or explicit as that which can legitimately be seen on video (particularly material classified by the BBFC as ‘R18’), on specialist PIN-encrypted television channels and at adult cinemas, because of the different make-up and expectations of their respective audiences.

Again, nudity after the watershed depends heavily on context. The vast majority of viewers, for example, do not object to seeing even the most explicit nudity e.g. close-ups of male and female genitalia, in the context of medical procedures such as cosmetic surgery, as long as it’s shown well after the watershed and they are properly forewarned. However, the same shots might not be acceptable if presented in a sexual context.

Blurring or pixelation, both before and after the watershed, is one way in which

otherwise unacceptably graphic and explicit material may be rendered acceptable. However, there may be circumstances where, even following pixelation, scenes remain too suggestive or graphic.

When considering the suitability of sexual material in a particular context, no distinction is made based on sexual orientation i.e. the considerations when deciding whether sexual material is suitable in any particular programme, at any particular time of day, are the same regardless of whether the sex is homosexual or heterosexual.

Sexual violence in programmes, as noted above, requires special care. See ‘Sexual Violence’ earlier in this chapter.

‘Sex & Children’

Sex between adults and children is illegal. Any depiction of such activity e.g. in a dramatic context or where real images are being obscured would require strong editorial justification and extremely careful handling.

The Protection of Children Act 1978 (as subsequently amended) makes it a criminal offence to take or show an indecent photograph (which includes filming for television) of a minor under the age of 18 and even to involve a minor in a photograph or television image that is itself indecent, even where the child’s role in it is not e.g. to have a child present or to broadcast an image where a child’s picture had been superimposed onto a pornographic image would be an offence. This also means that in drama, any actors that are required to be filmed in scenes of an explicit sexual nature must be at least 18 years old, regardless of the age of the character they are playing. If in any doubt about an actor’s age, producers must seek confirmation e.g. request to see his/her passport and take a copy to be held on file.

If your programme concerns children who are the victims of sexual offences this can raise difficult issues. Programme-makers who are intending filming or incorporating into their programme any sexually explicit material, particularly if it involves people under 18, should consult with their commissioning editor and assigned programme lawyer at an early stage and certainly before any filming takes place or before any such material is acquired or accessed to ensure that it complies with UK law and will be transmittable.

See 'Programmes Involving Under 18s' Checklist at chapter 6.

ACQUIRED MATERIAL

The Code contains the following rules in relation to acquired material that is already the subject of a BBFC (British Board of Film Classification) certification.

- No film refused classification by the BBFC may be broadcast unless it has subsequently been classified or the BBFC has confirmed it would not be rejected according to standards currently operating.
- If the BBFC has classified a film subject to certain cuts, then no version of the film can be shown on television which includes that cut material unless: a) the BBFC has confirmed the material was only cut in order for the film to be classified at a lower category e.g. for younger viewers; or, b) the cuts were required in the past and the BBFC has confirmed that such cuts would no longer be required under current operating standards.
- '18' Certificate films must never start before 9pm on Channel 4 and Five. Even then, such films should comply with other provisions of the Code and may well only be suitable for a later transmission.

- Films with a BBFC 'R18' certification cannot be broadcast on any television channel at any time.

DISCRIMINATORY TREATMENT OR LANGUAGE

Broadcasting discriminatory comments or showing the discriminatory treatment of minorities, particularly of those that are vulnerable, may give rise to widespread offence, at any time of day. The Code states that any such discriminatory treatment or language "... e.g. on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation ..." must be justified by the context. You should note that material of this nature could also be subject to other legal restrictions (including the criminal law). If you have any queries, please contact your commissioning editor and programme lawyer at the earliest opportunity. Below are some of the more common areas where problems can arise.

Ethnic Minorities

- Nothing transmitted should be intended to stir up racial hatred or, taking into account the circumstances, be likely to do so.
- Racist terms should be avoided, as should insensitive comments or stereotypical portrayals of particular ethnic groups, unless there is editorial justification and they can be justified within the context of the programme. For example, viewers are likely to accept footage of racist behaviour and language in a current affairs programme exposing and clearly condemning racism but, perhaps, less so in a reality show or discussion programme where an individual is effectively seen as having a platform to promote racist views without being properly challenged.

- Some viewers find the use of the most racially offensive words such as 'nigger' and 'paki' unacceptable and offensive in any context. Viewers may still be caused considerable offence, even where the person who uses the word has no racist intent, e.g. the use of the 'n-word' in a rap song.

- Even where editorially justified an appropriate flagging or warning that a programme contains racially offensive behaviour or language may be necessary.

Disabilities

- Comments or jokes at the expense of people's disabilities are likely to cause widespread offence and be unacceptable. Such humour can be offensive to many, even where no malice is present.
- Unless editorially justified, patronising or outdated derogatory expressions relating to disability e.g. cripple, spastic, midget etc. should also be avoided and replaced with more neutral terms e.g. disabled person, person with cerebral palsy, dwarf etc.

- Stereotyping disabilities or medical conditions is likely to be problematic e.g. stereotyping people with the condition Tourettes as constantly swearing; or the casual use of words like "schizophrenic" to mean "in two minds" can also cause offence. The inclusion of material at the expense of people with disabilities must be justified editorially and by the context.

Sexual Orientation

- As with ethnic minorities and the disabled, the casual or insensitive use of offensive terms, such as 'poof' or 'queer', can cause serious offence, regardless of intention. In addition, use of word 'gay' as a negative adjective can cause offence, even where none is intended.

Religion

Religion and religious beliefs are very important to many viewers and care should be taken with any material that might amount to an abusive or derogatory treatment of the religious views and beliefs of those belonging to a particular religion.

There is, of course, scope for valid criticism, negative comment and humour based on or concerning many aspects of religion but it should always be justifiable editorially and by the context. Care needs to be taken not simply to undermine or ridicule central religious beliefs. See also "Religious Programming" at subchapter chapter 4E.

Other Minorities

Similar considerations apply to the treatment of other minority groups within programmes e.g. older people and minority language groups. As with race, disability, sexuality or religion, there is some latitude for comments or humour based on or around these groups but where comments are made, programme-makers and broadcasters must consider the potential of the comments to cause real offence. Any offence should be justifiable on editorial grounds and by the context.

PRESERVING HUMAN DIGNITY, SCENES SHOWING HUMILIATION AND DISTRESS

Care needs to be taken when showing or portraying people in circumstances where they are being humiliated or are in a state of distress, even where they have consented, as this, in turn, may cause distress and offence to viewers. Such scenes are most likely to be included in news and factual programmes, although of course they may also be portrayed in drama and film and still have the potential to cause serious upset and offence. In all

cases, the inclusion of such scenes needs careful thought and must be justified editorially and by the context.

News & Factual Programming

Many stories in the news, by their very nature, involve people who are victims of one kind or another e.g. victims of war, terrorism, crime, natural disaster, illness or accident. Any references to such stories require care and sensitivity and must have regard to the feelings not only of the victims and their families (who may or may not be watching) but also of the wider viewing public. For example, broadcasting images of seriously injured, identifiable people in the immediate aftermath of a terrorist attack may well cause serious offence to many viewers who may consider such images to be intrusive, not to mention distressing. Programme-makers and broadcasters must also have regard to the individual privacy rights of those they film. See Chapter 4D, Privacy. See also Chapter 5C, Privacy, Confidence and Data Protection'.

Footage that actually shows individuals about to die or dying, being killed or murdered i.e. around or at the actual point of death, require exceptional justification for obvious reasons. The inclusion of any such material will require reference up in accordance with Channel 4's and Five's internal compliance procedures and flagging in advance to viewers.

Entertainment Programming and Topical Humour

Many entertainment programmes base humour on and around stories in the news. Such programmes are entirely legitimate but, again, where stories involve victims, programme-makers must have regard to the feelings not only of the victims and their families (who may or may not be watching) but also to the general viewing public who are likely both to empathise and sympathise with the

victim(s) and those close to them.

Obviously there will be certain news stories in respect of which any attempt at humour will be problematic e.g. a joke about hostage taking around the time that British citizens were being held hostage and murdered in Iraq would almost certainly cause widespread offence and be unacceptable. Similarly, jokes concerning major natural disasters or serious accidents that involve loss of life, around the time of these events, would also be problematic.

However, there will be other stories in the news involving victims which are not so clear-cut. Generally, the more serious the plight of the victim(s), the less likely that humour or flippant comment based on the story will be permissible. For example, common sense dictates that it would be much more difficult to base humour on or around a story about the brutal mugging of a pensioner than it would be about a story concerning a businesswoman who managed to fight off or outwit her attackers. In addition, some stories that involve a victim may be so absurd that some humour is acceptable e.g. many tabloid stories.

When considering whether it is acceptable to refer to or base humour on such stories, programme-makers and broadcasters should also have regard to the amount of time that has lapsed between the event in question and the comments being made. Similarly, geographical location may also play a part in deciding whether particular comments can be broadcast. For example, viewers are likely to be much more tolerant of humour based on a story about someone who has been the victim of a crime in a country on the other side of the world, than they would about a similar story involving a victim in the UK. With the latter, not only may the victim or his/her friends and family be watching but the

British viewing public are more likely to feel empathy and sympathy for a victim that is close to home.

Similar considerations apply when people in the public eye die. The vast majority of viewers expect broadcasters to display a degree of respect for those that have recently died and for those close to them left behind. Consequently, humour based around a recent death is unlikely to be acceptable.

Intervening Events

Real life events, or 'intervening events' as they are often referred to, which could not reasonably have been anticipated when a programme was commissioned or scheduled, may render a programme inappropriate for its planned transmission and, accordingly, the programme may have to be edited or postponed to a later date.

Intervening events are generally real-life tragedies generating widespread public concern. Examples of intervening events might include:

- a terrorist attack involving loss of life or limb, especially if it is close to the UK or significantly involves British people;
- a large scale accident such as a plane crash or a natural disaster like an earthquake or tsunami involving substantial loss of life, again especially if it is close to the UK or significantly involves British people;
- the recent death or serious illness of an individual featured in, referred to or criticised in a programme, who may be but is not necessarily a celebrity or in the public eye.

For example, it may well be appropriate to postpone a disaster movie about a plane crash (which is a piece of entertainment) in the days following a real life domestic plane crash, or to re-edit an earlier

recorded programme which features humour at the expense of an individual who by the time of intended transmission is seriously ill or has just died.

Decisions about whether or not to re-edit or postpone the broadcast of programmes because of 'intervening events' are dependent on the particular circumstances and are rarely clear cut. For this reason they should be referred up in accordance with Channel 4's and Five's internal compliance procedures.

More generally, programme-makers and commissioning editors should always keep an eye on what is happening in the news and consider carefully whether that could have any effect on the suitability of their programmes for broadcast.

Note: intervening events may also render programmes unsuitable for broadcast for legal reasons. See Chapter 5A, 'Defamation' and Chapter 5B, Contempt and Reporting Legal Proceedings.

DRUGS, SMOKING, SOLVENTS AND ALCOHOL

Before the Watershed

● The use of illegal drugs, drug abuse, smoking, solvent abuse and the misuse of alcohol must never be condoned, encouraged or glamorised and scenes showing such material should generally be avoided unless there is editorial justification. They must not be featured in children's programmes unless there is strong editorial justification.

After the Watershed

● These activities should not be condoned, encouraged or glamorised in programmes likely to be widely seen by under 18s unless there is editorial justification.

PROGRAMMES INCLUDING EXORCISM, THE OCCULT & THE PARANORMAL

The Code states that *“Demonstrations of exorcisms, occult practices and the paranormal (which purport to be real) must not be shown before the watershed”*.

This rule does not apply to drama, film or comedy.

The word “demonstration” implies some sort of physical activity and an actual attempt to undertake these practices, as opposed merely to a discussion of the issues or what’s involved.

Note: Ofcom Code guidance provides the following definitions:

“Exorcism” means the banishing of unwanted forces or entities from a person, place or thing and may be done in the name of religion or otherwise.

“Occult practices” means practices involving secret knowledge or a secret activity usually of a religious, spiritual or mythical nature that invoke unknown powers or forces and risks a negative outcome. It includes most spells, especially those that appear to be aimed at interfering with another person’s rights. Tarot is regarded as an occult practice, although insight into the future by means of other types of cards generally falls within the “paranormal”.

The “paranormal” is unexplained psychic phenomena which is intended to lead to positive outcomes. It includes clairvoyance (seeing what is out of sight), clairaudience (perceiving, as if by hearing, what is inaudible), extra sensory perception and mediumship (communication with the spirits of the dead). However, ouija, given that it is generally deemed to risk a

negative outcome, is likely to be classed as occult.

The Code also states that: *“Paranormal practices which are for entertainment purposes must not be broadcast when significant numbers of children may be expected to be watching”*.

and,

“Demonstrations of exorcism, the occult, the paranormal, divination, or practices related to any of these that purport to be real (as opposed to entertainment) must be treated with due objectivity”.

Thus entertainment programmes which feature paranormal practices i.e. programmes where viewers know that what they’re seeing is some sort of illusion, as opposed to being the result of some supernatural, unknown force, can be broadcast before the watershed, but not when significant numbers of children may be watching i.e. before and after school up until about 8pm on weekdays and throughout the day at weekends and during school holidays.

In addition, there is a requirement that when the above practices are purporting to be real in post-watershed programmes (they could not be shown before), they must be treated with due objectivity, meaning that programmes should not simply accept at face value what is happening as some sort of psychic phenomena but question and explore what alternative explanations might exist.

“Divination” means foretelling the future using magical, religious or supernatural means. There are many forms e.g. astrology, dice, crystal balls, tarot, tea leaves etc. Some e.g. tarot are deemed to be part of the occult, although most are classed as merely paranormal activities.

When astrology is not based on any religious or paranormal belief system, such as in the case of most daily horoscopes, then it will be suitable for broadcast at any time of day and is not deemed to be a paranormal practice within the definition of the Code. However, when it is based on a paranormal belief system, then it falls within the definition of paranormal practices and the restrictions as outlined above would apply.

The Code also states that:

“If a demonstration of exorcism, the occult, the paranormal, divination or practices related to any of these is for entertainment purposes, this must be made clear to viewers”.

and

“Demonstrations of exorcism, the occult, the paranormal, divination or practices related to any of these (whether such demonstrations purport to be real or are for entertainment purposes) must not contain life changing advice directed at individuals”.

“Life changing advice” is defined as *“... direct advice for individuals upon which they could reasonably act or rely about health, finance, employment or relationships”*. So a clairvoyant telling someone to invest in a particular company or leave their job or their partner is prohibited at any time of day.

HYPNOSIS

Hypnosis can be presented purely as entertainment (stage hypnosis) or as a means of helping individuals overcome particular problems or anxieties e.g. phobias. In all cases, the Code requires that broadcasters must *“...exercise a proper degree of responsibility in order to prevent hypnosis and/or adverse reactions in viewers ...”* and *“... the hypnotist must*

not broadcast his/her full verbal routine or be shown performing straight to camera”. In addition, hypnotists must ensure that they are complying with The Hypnotism Act 1952. Programme-makers should refer to the legal and compliance department for advice if hypnotism is to be included within a programme.

SUBLIMINAL MESSAGES

The Code states that techniques must not be used which *“... exploit the possibility of conveying a message to viewers ... or of otherwise influencing their minds, without their being fully aware of what has occurred...”*. In other words, if an image is deliberately included that is so brief that the average viewer would not realise that they’d seen it, then that would be unacceptable.

SIMULATED NEWS

Sometimes entertainment shows and dramas, even documentaries, include fake news items within them, which can seem authentic. The Code states that broadcasters must ensure that there is no reasonable possibility of viewers being misled into believing they are watching real news items in such circumstances.

PHOTOSENSITIVE EPILEPSY

Some viewers with photosensitive epilepsy are sensitive to flashing lights and certain repetitive visual patterns, many of whom don’t even know they have this sensitivity.

All programmes should comply with Ofcom’s guidelines referred to in Rule 2.13 of the Code. Programmes that do not comply are likely to fail their technical review and sequences may have to be altered or removed. The guidelines

can be found on Ofcom’s website (www.ofcom.org.uk), annexed to the guidance notes accompanying Section 2 of the Code.

As a very basic guide, if a sequence of flashes occurs more than 3 times per second and covers more than a quarter of the screen, it is likely to be problematic.

On occasions the Code anticipates that it may not be possible to follow this guidance and where that is the case and where broadcasters can demonstrate that the broadcasting of such flashing lights and/or patterns is editorially justified, alerting viewers in advance will suffice e.g. flash photography in a live or fast turn around news item at a film premiere or some other similar event. The warning should be given verbally and, where appropriate, in text, at the start of the programme or particular item. Before this is done, producers should always seek the advice and consent of their commissioning editor.

PROTECTING UNDER 18s FAQs

Q. What is meant by the term “children”?

A. In compliance terms, “children” are individuals under the age of 15, so when the Code states that material before the watershed should not, in general, be unsuitable for children, this means viewers under 15. The Code contains a number of rules that relate specifically to children and others that relate to anyone under 18, which of course includes children.

In terms of the law, however, ‘15’ has little significance. In law, ‘18’ is the most significant age in this context, as this is the age at which an individual reaches ‘majority’ or adulthood. However, note that in relation to some areas of the law, once an individual reaches 16, this is significant e.g. young people can legally marry, and waive their legal right to anonymity in some circumstances.

The Code says that parental consent should normally be obtained for under 16’s taking part in programmes.

Q. Does everything before 9pm have to be suitable for young children?

A. The Code states that “material unsuitable for children (those under 15) should not, in general, be shown before 9pm or after 5.30am”. However, what is suitable or unsuitable will depend on a number of factors, so material should always be judged on the basis of the particular context and the likely audience. The Code anticipates that there may be material broadcast before the watershed which potentially could distress children and that, in such circumstances, broadcasters should flag this up to viewers with clear information about the programme’s content. See ‘Scheduling and the Watershed’ above.

Q. Can the word “fuck” ever be included in programmes before 9pm?

A. No. The Code states that the “most offensive language”, which includes the word “fuck”, should never be broadcast before 9pm. It does not matter what the context is or how strong the editorial justification is: if the word “fuck” or any derivative is included within a programme before 9pm, it will amount to a breach of the Code. See ‘Offensive Language’ above.

Q. ‘Bleeped’ or ‘dipped’? And does a person’s mouth also have to be pixelated?

A. It generally makes no difference whether a potentially offensive word is cut, ‘bleeped’ or ‘dipped’; the important point is that no part of the offensive word is audible. However, some viewers find numerous bleeps in a pre-watershed programme annoying. It is best to check with your commissioning editor, as they may have a preference from a stylistic point of view. Taking the further precaution of pixelating a person’s mouth will only be necessary in very rare cases e.g. when it is patently clear that a person or character is using the most offensive language e.g. someone mouthing “cunt”, “motherfucker” or “fuck” directly to camera, at a time when large numbers of children may be expected to be watching. See ‘Offensive Language’ above.

Q. Does nudity always have to be pixelated? What about when it's non-sexual?

A. Whether or not nudity will need to be pixelated will depend on the context in which it appears e.g. the time of transmission, whether it is in a sexual context or not. Before the watershed, nudity in a sexual context is likely to require pixelation although mild non-sexual nudity may be acceptable e.g. topless sunbathing, a brief shot of a naked person from behind. After the watershed, nudity in a non-sexual context, even full-frontal nudity, is unlikely to be problematic or require pixelation. Whether nudity in a sexual context will need to be pixelated again will turn on the level of explicitness and whether it is justified editorially and by the context. See 'Sex and Nudity' above.

Q. Can dangerous behaviour ever be included in programmes before 9pm?

A. All dangerous or potentially dangerous behaviour must, of course, be judged in context and be justifiable. Often such behaviour will be justifiable - for example car chases, people jumping out of aeroplanes, extreme sports etc. are all included in many programmes and films that are broadcast before the watershed. The sort of material that is likely to be problematic is dangerous behaviour that is capable of easy imitation by children and which would lead to harm e.g. showing a child playing 'hide and seek' and hiding in the drum of a washing machine; including a stunt with knives or matches in a programme before the watershed i.e. behaviour involving items found in the home which children are likely to be able to get their hands on and might copy. See 'Violence and Dangerous Behaviour' above.

Q. In what circumstances is it acceptable to show the drinking of alcohol or smoking before the watershed?

A. The featuring of alcohol within programmes before the watershed is commonplace e.g. in soaps, television drama, movies, televised events, some entertainment show formats, cooking programmes etc. In all cases, however, it should be justified by the context in which it appears and not be unduly prominent.

However, the misuse of alcohol i.e. heavy or reckless drinking, should generally be avoided in programmes before the watershed and must not be encouraged, condoned or glamorised unless there is editorial justification (and very strong editorial justification for programmes made primarily for children) e.g. the storyline taken as a whole highlights the perils of misusing alcohol by including the negative consequences.

The same principles apply to smoking as the misuse of alcohol i.e. it should generally be avoided before 9pm and not condoned, encouraged or glamorised unless there is editorial justification (and very strong editorial justification in programmes made primarily for children). Gratuitous smoking shots, such as prolonged dragging on a cigarette, should be removed from pre-watershed programmes where possible. See 'Drugs, Smoking, Solvents & Alcohol' above.

Q. Do special rules apply when under 18s are involved in the making of programmes?

A. The Code contains a number of rules specifically aimed at protecting those young people who are involved in the making of programmes e.g. interviewees, actors,

contestants etc. The Code states that parental consent should normally be obtained for under 16's taking part in programmes. In addition, programme-makers and broadcasters must ensure that: a) due care is taken over the physical and emotional welfare of under 18s and their dignity is respected, irrespective of whatever the young person or their parents have consented to; b) people under 18 are not caused unnecessary distress or anxiety by taking part in programmes; and, c) prizes aimed at children are appropriate to the age range of the target audience and the participants. See generally 'Programmes Involving Under 18s Checklist' at chapter 6.

HARM & OFFENCE FAQs

Q. What does it mean to say that something “...is justified by the context”?

A. Decisions about whether potentially harmful or offensive material is justified by the context in which it appears will often be subjective and there are always likely to be some viewers that disagree with the choices made by broadcasters. However, by carefully considering a number of particular factors, programme-makers and broadcasters aim to ensure that the content of their programmes does not exceed the expectations of the vast majority of viewers. Whilst not an exhaustive list, factors which determine the context include: the particular nature of the potentially harmful or offensive material (the tone, how explicit/graphic it is); when the material is scheduled (late night, pre-watershed, in school time, at times when large numbers of children are likely to be watching); the type/genre of the programme (factual, drama, entertainment, educational, intelligent, artistic, comedic); the audience’s expectations (prior knowledge, whether an on-air warning was given); the nature of the Channel on which the material appears (specialist Channel or mainstream terrestrial broadcaster).

Q. Can very adult material be shown straight after the 9pm watershed.

A. After 9pm adult material may be shown as long as it is justified by the context, but the Code makes clear that there must be a gradual progression towards more adult material i.e. “9pm is a watershed, not a waterfall”. Very adult material, therefore, should be reserved for well after the watershed.

Family viewing resumes from 5.30am. Whilst there is no regulatory requirement that there should be a gradual progression towards less adult content as schedules approach 5.30am, it is advisable not to show the most adult material immediately before then. Immediately thereafter, of course, programmes must be entirely suitable for family viewing. See ‘Scheduling and the Watershed’ above.

Q. Does the word “cunt” always have to be bleeped or edited out?

A. Before the watershed, yes. After the watershed, not always. Like any other potentially offensive word “cunt” can be included in programmes after the watershed, if it is justified editorially and by the context. However, to the vast majority of people it is considered to be by far the most offensive word and, thus, requires exceptional justification and an on-air warning for “very strong language”. See ‘Offensive Language’ above.

Q. Do special rules apply to trailers for programmes?

A. As audiences are likely to come across most trailers and promotions for programmes without any prior warning and, therefore, any expectations of what they are about to see, they cannot generally be forewarned about the content e.g. that it contains strong language or adult sexual content. Furthermore, the context is unlikely to justify the inclusion of such material. Particular care is required, therefore, both in relation to the content and the scheduling of such material. On rare occasions, where trailers do

contain more challenging material, they should be scheduled appropriately and they may exceptionally be preceded by an appropriate content warning. See ‘Programme Trailers & Promotions’ above.

Q. What sorts of things should viewers be warned about? What should on-air warnings say?

A. Viewers should be forewarned at the start of a programme of any material that may cause significant offence e.g. strong language, sex, violence, etc.. Whether or not a warning is appropriate will of course depend to a large extent on the context in which the material appears e.g. we may warn viewers about use of the word “fuck” in a programme at 9pm, but not one starting at 10:30pm where there are only a few instances. Warnings should be clear and unambiguous e.g. “This programme contains strong language from the start”; “This programme contains lots of very strong language from the start and throughout, scenes of a violent, sexual nature and is for adults only”. Occasionally, we may decide it is appropriate to warn both at the start of a programme and again going into the programme part containing the potentially offensive material e.g. “Now we return to [name of programme] which contains scenes of graphic violence which some viewers may find disturbing”. See ‘On-Air Warnings’ above and, for Channel 4 programmes, see also Channel 4’s Compliance Procedures at Chapter 2.

Q. Can you warn audiences about the content of pre-watershed programmes?

A. Since programmes before the watershed should, as a rule, be suitable for children, warnings of the type given above should not be necessary i.e. programmes before the watershed should not contain such material. However, there may be times where we may be justified in broadcasting challenging or unexpected material before the watershed e.g. showing scenes of war or disaster in news programmes, which some viewers may find distressing. In such circumstances, clear ‘flaggings’ should be given e.g. “the following report contains scenes of famine and death which some viewers may find distressing”. In addition, there may be scenes which, again, whilst justified may distress or surprise some viewers, including children, e.g. a medical examination, surgical procedure or an animal having to be put to sleep. Again, such material should be clearly flagged up to viewers in advance, including into the programme part containing the material if necessary.

Q. When dramatising real events do all reconstructions need to be labelled?

A. No, it is only necessary to label reconstructions as such where there is a real risk that viewers may be misled i.e. not realise that what they are watching is a reconstruction. Reconstructions may also be made apparent by the way the film looks or is treated. See ‘Viewer Trust: Truth, Accuracy and the Importance of not Misleading the Audience’ above.

Q. Does accuracy really matter in a ‘formatted’ or entertaining documentary or ‘life style’ show?

A. Absolutely. Viewer trust is of paramount importance. Programmes must not mislead viewers and programmes must be true, accurate and fair. The importance of viewer

trust is not limited to current affairs, documentaries or conventional factual programmes. Simply because a programme is primarily designed to entertain or is 'formatted' does not mean that there is a licence to mislead the audience. Please refer to and follow the Channel 4 Viewer Trust Guidelines at Appendix 7A and Five's Viewer Trust Guidelines at Appendix 8A. Also, see 'Viewer Trust: Truth, Accuracy and the Importance of not Misleading the Audience' above.

Q. What does it mean to 'mislead viewers'? Doesn't all television mislead the audience to a degree?

A. Our viewers are entitled to respect and that means they must feel confident that they can take what they see or are told in a programme at face value. Programme-makers must never stage, construct, reconstruct, re-enact or otherwise fake any scenes of actuality and pass them off to our viewers or to Channel 4 or Five as the real thing. Please refer to and follow the Channel 4 Viewer Trust Guidelines at Appendix 7A or Five's Viewer Trust Guidelines at Appendix 8A. See also 'Viewer Trust: Truth, Accuracy and the Importance of not Misleading the Audience' above.

Q. Can exorcisms be shown on television?

A. Yes but the Code contains specific rules in relation to the content and scheduling of such programmes, as it also does with programmes that include occult practices and paranormal behaviour. See 'Programmes Involving Exorcism, the Occult and the Paranormal' above.

Q. Can programmes portray someone committing suicide?

A. Yes but programmes that make reference to suicide, particularly those that show visual demonstrations of methods of suicide, require very careful thought and handling. Scenes showing the techniques of suicide should only be included if justified editorially and by the context. In addition, it may be appropriate to seek professional, expert advice on how the matter is being handled within a particular programme and how it is likely to be perceived by vulnerable viewers. See 'Suicide & Self Harm' above.

Q. Can someone actually be shown taking drugs on television?

A. Yes. Provided it is justified by context, appropriately scheduled and where necessary there is a warning. There must be no detailed description of 'how to' take drugs and drug taking must not be shown as problem-free or glamorous. If the person shown on camera taking drugs is a real person, programme makers should consider the potential consequences of showing this on television. See 'Drugs, Smoking, Solvent & Alcohol' above. See also Chapter 4B, 'Crime' and 'Programmes Involving or Concerning Crime' Checklist at Chapter 6F.

4B. CRIME

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KEY POINTS

Encouraging or Inciting Crime

- Programmes must not contain material that is likely to encourage or incite crime, or lead to disorder.

- Programmes should not contain detailed descriptions of criminal techniques that could enable the commission of the crime, unless there is editorial justification.

Payments

- Confessed or convicted criminals should not be paid (or benefit financially in some other way) for interviews about their crimes unless it is in the public interest to do so.

- Any programmes featuring convicted or confessed criminals should be referred to the legal and compliance department for early advice. No payment or commitment to pay a criminal should be made before this has been approved by the commissioning editor and programme lawyer.

- In criminal legal proceedings, no payment or promise of payment must be made to a witness or potential witness until proceedings have ceased i.e. the defendant has been convicted or acquitted. Only actual expenditure or loss of earnings necessarily incurred during the making of a programme contribution may be reimbursed.

- Where criminal legal proceedings have not commenced but are likely and foreseeable e.g. following an undercover investigation into criminal activity, payments to those who reasonably may be expected to become a witness should only be made if it is in the public interest e.g. the criminal activity could not reasonably have been uncovered without the payment being made.

Under 18s

- When reporting on legal proceedings, any under 18s involved must not be identified, even indirectly, where to do so would breach the law. Even when reporting on pre-trial investigations where there is no legal prohibition on identifying under 18s, careful consideration should be given to the position of potentially vulnerable young people and children before identifying them or broadcasting personal details about them. See also 'Contempt and Reporting Legal Proceedings' at Chapter 5B.

CRIME

[See Section 3 of the Code at page 20]

Many programmes, including the news, feature or deal with criminals and/or criminal behaviour in one way or another. It is a regular feature of popular drama and can crop up in a variety of ways in virtually any factual programme.

For obvious reasons, any programmes dealing with or touching upon criminal behaviour need to be handled with care and are likely to require advice from the programme lawyer from an early stage and throughout.

Below is a summary of the regulatory rules in relation to dealing with crime in programmes. This should be read in conjunction with Chapter 5B, Contempt and Reporting Legal Proceedings; Chapter 5F, Programmes Involving Criminal Activity; and, Chapter 6F, Programmes Involving or Concerning Crime' Checklist.

MATERIAL LIKELY TO ENCOURAGE OR INCITE CRIME OR LEAD TO DISORDER

Material likely to encourage or incite crime or lead to disorder must not be included in programmes.

- This applies to all crime i.e. criminal law offences punishable by a fine or imprisonment.

- "Disorder" relates to the criminal offence of 'civil disorder', but also more generic acts "*.. that might lead to or provoke the commission of an offence*".

- Whether material is "likely" to encourage or incite crime or lead to disorder will depend on a number of factors. Merely filming and broadcasting criminal activity will not generally, in itself,

amount to encouragement or incitement to commit that offence. However, featuring criminal activity and presenting it in a way which arguably glorifies or glamorises it, or which fails to show the negative consequences i.e. for both victim or perpetrator, might well be problematic. Direct calls or deliberate provocation to viewers to commit crimes which are left unchallenged in the programme e.g. giving air time to a religious extremist actively calling for violent acts to be carried out against members of other faiths, would almost certainly be likely to breach this rule and potentially the criminal law.

- Where criminal activity is featured in programmes, it should normally be made clear that the activity in question is indeed criminal, if it is not obvious, in case some viewers mistakenly believe such behaviour is legal and, therefore, acceptable.

- In relation to certain types of crime featured in programmes, it may be appropriate to ensure that the negative consequences of the criminal activity are included (over and above the fact that it's an offence), if there is a risk that the activity might appear glamorous or problem free e.g. drug abuse.

DESCRIPTIONS OR DEMONSTRATIONS OF CRIMINAL TECHNIQUES

Descriptions or demonstrations of criminal techniques containing essential details that could enable the commission of a crime should not be included unless editorially justified.

- This rule is more likely to apply to those crimes that involve generally unknown methods and techniques, that members of the viewing public would be unlikely to be aware of e.g. how to commit ingenious types of fraud.

● Even in programmes the very subject of which is to examine these types of crime in detail, it will not normally be necessary to show each and every step and technique involved in the commission of the offence. In those rare cases where it is, thus potentially enabling criminally inclined viewers to copy such behaviour, there should be strong editorial justification e.g. it might be essential to show all the elements of a crime in order for viewers to be able to understand it properly and, thereby, be able to guard against such crime themselves.

PAYMENTS

Payments to Criminals

No payment, promise of payment or payment in kind may be made to convicted or confessed criminals for interviews or some other contribution to the programme in relation to their crimes, the only exception being where it is in the public interest.

● Generally payments cannot be made to criminals, whether they have been convicted or not, for interviews about their crimes. The public policy reason for this is to prevent criminals profiting from their crimes.

● The Code refers to “payment”, “promise of payment” and “payment in kind”. This covers making (or promising to make at some future time) cash payments or any other kind of payment e.g. a gift, paying off a debt etc., to the criminal for whatever reason. Only actual and necessarily incurred out of pocket expenses may be reimbursed.

● The payment must be for an interview or some other contribution to the programme related to the crime. Thus it would not be a breach of this section to pay a convicted criminal for taking part in a programme, if the contribution was not based upon the crime he/she had committed e.g. in theory, a convicted burglar could be paid for taking part in a reality game show (but

there might be other reasons why that would be inappropriate).

● The words “some other contribution” are included to prevent circumvention of the rule. For example, it would prevent programme-makers paying a licence fee to a criminal for photographs relating to the crime that he/she owns and supplies to the programme.

● Family members or associates of the criminal can be paid if they themselves make a contribution to the programme, as long as that payment does not benefit the criminal in any way e.g. the family member may be the criminal’s victim. Where family members or associates do not themselves actually make a contribution to the programme, it is unlikely that payments to them will be acceptable, as this is likely to be seen as benefiting the criminal. Decisions about whether or not to pay family members or individuals close to criminals rather than the criminal him/herself should always be referred to the commissioning editor and programme lawyer.

● Payments, promises of payment and payments in kind can be made to criminals for interviews and other contributions about their crimes, where it is in the public interest. Whether or not there is a public interest will depend on a number of factors including: whether a payment is necessary i.e. would the criminal agree to be interviewed regardless of payment?; the purpose of the interview or contribution to the programme; what benefits there might be in the interview going ahead; the nature and seriousness of the crime; the likely feelings of/the effect on the victims, if any; the time elapsed since the commission of the offence and the programme etc.. Where, after careful consideration, such a payment is made in the public interest, Ofcom states in its guidance that it may be appropriate to inform viewers in the

programme that a payment has been made and the reasons why.

Any programmes featuring convicted or confessed criminals should be referred to the legal and compliance department for early advice. No payment or commitment to pay a criminal should be made before this has been agreed to by the commissioning editor and programme lawyer. In the case of serious criminal behaviour, the matter should be referred up for approval in accordance with Channel 4’s and Five’s internal compliance procedures.

Where Proceedings are Active

Proceedings become active when someone is arrested or charged with an offence. See Chapter 5B, ‘Contempt and Reporting Legal Proceedings’.

Payments to Witnesses in Legal Proceedings

No payment or promise of payment may be made, directly or indirectly, to any witness or any person reasonably expected to be called as a witness.

● Payments or promises of payment must not be made to witnesses or those likely to be become witnesses. There is no ‘editorial justification’ or public interest exception. Clearly this rule only prohibits payments to witnesses/potential witnesses where their contribution to the programme is connected to the legal proceedings in which they are or may become a witness.

● Again, this provision covers direct and indirect payments i.e. that is anything of monetary value to the witness/potential witness or those connected to them that would be of benefit to the witness/potential witness.

Payments Made Dependent on the Outcome of a Trial

No payment to any witness or any person reasonably expected to be called as a witness may be suggested or made dependent on the outcome of a trial.

● This rule is designed to prevent those sorts of deals that have occurred in the past, where media organisations have promised to pay witnesses a sum of money for their story, on the condition that the defendant is found innocent or guilty, more commonly the latter. There are obvious public interest reasons for outlawing this practice, not least that it may call into question the motives of those giving evidence. Will a witness feel pressured to embellish their evidence in order to secure a conviction, thus enabling them to collect their ‘reward’? Whether or not a witness actually does fabricate or exaggerate his/her evidence in order to benefit from the promised sum is not the key issue; the problem arises from the doubt the promise of payment sows in the minds of the jury.

Reimbursing Expenditure and Loss of Earnings

Only actual expenditure or loss of earnings necessarily incurred during the making of a programme contribution may be reimbursed.

● Payments can be made to witnesses/potential witnesses you are filming with in order to reimburse them for actual expenditure they’ve incurred e.g. travel costs, loss of earnings as a direct result of the recording.

Programme-makers should refer to the legal and compliance department for advice wherever a witness or potential witness in legal proceedings is taking part in a programme. Any payments to such contributors to cover expenditure or loss of earnings must be approved by the commissioning editor on the advice of the programme lawyer and referred up in accordance with Channel 4’s and Five’s

internal compliance procedures where necessary before any payment is offered or made.

Criminal Legal Proceedings which are “Likely and Foreseeable”

Payments should not be made to people who might reasonably be expected to be witnesses unless there is a clear public interest e.g. investigating crime or serious wrongdoing, and the payment is necessary to elicit the information. Such payments should be disclosed to the prosecution and defence if the person does become a witness in any subsequent trial.

- Where proceedings are not actually active i.e. no-one has been arrested or charged, but where they are foreseeable and likely at some future time, then payments can be made to potential future witnesses but only if it is clearly in the public interest. For a discussion of what constitutes the “public interest” see later at Chapter 4D.
- This rule applies not only to programmes where there is an on-going police investigation but also to those which uncover previously undetected crime and lead directly to proceedings being brought. For example, in a current affairs programme investigating a criminal drugs smuggling gang, the programme-makers may need to make a payment to a business associate of the gang in order to corroborate and prove the allegations, although this would need careful consideration and advance approval from the broadcaster. The programme-makers and broadcaster may well anticipate that following transmission, this person is very likely to be called as a witness in any subsequent prosecution. In such a case, the payment is likely to be justified because without it, the whole programme may fall i.e. the criminal practices being investigated will not be able to be proved. Following transmission, when handing

over material to the police, the programme-makers and broadcaster should alert the authorities to the fact that this person has been paid.

COURT REPORTING & UNDER 18s

In addition to the law [see Chapter 5B, Contempt and Reporting Legal Proceedings], the Code contains rules relating to the coverage of sexual and other offences in the UK involving under 18s, as follows:

- Where legal restrictions apply prohibiting the identification of minors involved in legal proceedings, programmes must be careful not to publish any material that would directly or indirectly lead to any of those individuals being identified, whatever their involvement in the proceedings. Where no such legal restrictions apply e.g. in the majority of cases where minors are given anti-social behaviour orders (ASBOs), then, in common with other parts of the media, there is, correspondingly, no regulatory restriction and minors can be identified, subject to the following:
- When covering pre-trial investigations into alleged offences, even where no legal restrictions apply, broadcasters should have particular regard to the vulnerability of any minor involved before broadcasting his/her name, address, identity of any school or other educational establishment, place of work or any picture of them.

PROGRAMMES INVOLVING CRIMINAL ACTIVITY

See also Chapter 5F, ‘Programmes Involving Criminal Activity’ and Chapter 6F, *Programmes Involving or Concerning Crime Checklist*.

In addition to the requirements of the Code, programme-makers making programmes involving criminal activity should have regard to the following.

Filming with criminals

When filming with criminals or filming criminal activity, bear in mind the following:

- Proceed with caution. Always seek appropriate legal advice from the programme lawyer before filming takes place. Criminals do not tend to be truthful and have a vested interest in their own protection, so it is advisable to keep them ‘at arm’s length’ and not to take at face value everything they tell you.
- When dealing with criminals that have a history of violence or intimidation, take appropriate precautions to ensure your team’s safety and do not give criminals home telephone numbers and addresses. If you have any safety concerns raise this with your commissioning editor and programme lawyer immediately.
- Be aware that individuals admitting criminal behaviour on camera could be investigated or even prosecuted after transmission and the film, including rushes, could be obtained by the police by a court order and used as evidence [see ‘Police Search Powers and Journalistic Material’ later at Chapter 5E]. Criminals tend to deny earlier admissions of criminality if challenged, so be appropriately wary, do not take what they say and do at face value. Be conscious of the fact they may deny what they have said later on and that they may try to blame you in some way.

See also the Channel 4 Viewer Trust Guidelines at Appendix 7A and Five’s Viewer Trust Guidelines at Appendix 8A.

Not Assisting in Criminal Activity

- If a programme-maker assists any criminal activity they too are likely to be guilty of a criminal offence.
- Whenever filming criminal activity, always remain as passive observers. Do nothing that could be deemed as encouraging, inciting or assisting criminal activity.
- Note: sometimes programme-makers may undertake activities which put them at risk of being arrested and charged with a criminal offence i.e. involve themselves in illegal activity in order ultimately to expose it. Such activities can be justifiable in the public interest. However, they require very careful consideration, research and preparation and must not be undertaken before detailed legal advice has been sought. Always refer to your commissioning editor and programme lawyer for advice before undertaking any activity which could amount to a criminal offence.

FAQs

Q. Can criminals ever be paid to take part in programmes? What about expenses?

A. Yes. If a convicted person is taking part in a programme and their contribution is unconnected with their criminal past, an appropriate payment may be made to that person. However, where a convicted person is taking part in a programme and their contribution is related to their crimes, no payment must be made to them unless it is justified by the public interest, any such payment having been approved by the broadcaster in advance. Modest expenses may be paid to criminals or those with a criminal past, whether or not there is a public interest but only on strict proof of the expenses incurred. Again, any such payment would require the consent of the broadcaster.

Q. Can payments be made to a criminal's family members or to someone close to him/her e.g. girlfriend, boyfriend?

A. If they themselves make a contribution to the programme, family members or associates of the criminal can be paid, as long as the criminal does not benefit from the payment. Where family members or associates do not themselves actually make a contribution to the programme, it is unlikely that payments to them will be acceptable. Any decision to pay family members or individuals close to criminals or those with a criminal past, rather than pay the criminal him/herself, must be approved by the broadcaster in advance.

Q. Can criminals be shown on television admitting to or committing criminal activity that they haven't yet been convicted for?

A. Yes. Criminals are often shown on camera admitting to criminal activity. Similarly, from time to time, actual criminal activity is caught on camera e.g. drug taking, violence, criminal damage etc.. The important thing to remember is that a programme-maker should not encourage, incite or assist criminal activity, otherwise they may be guilty of an offence. Programme makers should always remain as impartial, passive observers. In addition, remember not to take what you are being told at face value. Is the person who is admitting to criminal activity likely to be telling the truth? Please refer to the Channel 4 Viewer Trust Guidelines.

Q. What assurances can I give to a contributor who is willing to admit on camera to criminal activity but is worried about the potential consequences?

A. Whilst prosecutions are rare, any individual admitting to committing criminal activity on camera may be investigated and, potentially, prosecuted following transmission and the film, including any rushes, could be obtained by the police by a court order and used as evidence. For this reason, programme-makers cannot give assurances to contributors that they won't be investigated or prosecuted. It is important, therefore, that before filming takes place, they should understand the potential consequences of their actions.

Furthermore, programme-makers should always ask themselves why a person is willing to admit on camera to criminal activity. Always ask yourself, is the person telling

the truth? Do they have any reason to lie? And even if they are telling the truth, is the person likely to deny what they have said later on. Programme-makers need to consider carefully what possible implications this could have.

Q. Can witnesses in legal proceedings be interviewed? Can I pay them?

A. If you are interviewing an individual who happens to be a witness involved in legal proceedings and their contribution to the programme is unconnected with those proceedings, then interviewing that person or making a payment to him/her for their contribution should not be problematic. However, interviews with individuals who are witnesses involved in legal proceedings where the subject of the interview is connected, even indirectly, with the proceedings need to be handled very carefully. This is to ensure that the individual's evidence isn't prejudiced by their involvement with the programme. Any such interview must not be undertaken without the prior consent of the programme lawyer who will advise on exactly how the interview should be handled, if it can go ahead at all. In such circumstances, payments or promises of payments cannot be made.

Q. A contributor has been charged with a criminal offence. Does this mean we can't include him/her?

A. This will depend on what offence has been committed, the nature of the programme and of the contribution. There may be contempt issues or it may be that it would simply be inappropriate to proceed given the serious nature of the charges. The important thing to remember is to alert your programme lawyer immediately.

Q. Do I have to tell a victim of crime or, where the victim is dead, their family, if the crime is mentioned in the programme?

A. Usually, yes. In many circumstances informing the victim or their family will be appropriate, particularly if the crime is to be referred to or examined in some detail. Again, the programme lawyer will advise on what is required in this regard. See also 'Privacy' at Chapter 4D.

4C. FAIRNESS

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KEY POINTS

- The unfair treatment of individuals or organisations in programmes should be avoided.
- Informed consent. Programme-makers and broadcasters should be fair in their dealings with contributors. Contributors should take part in programmes on the basis of their informed consent. Any deviation from this rule must be justified by the public interest or otherwise.
- Parental consent will normally be required for contributors who are under 16. For individuals over 16 who are not able themselves to give informed consent, consent should be sought from an appropriate responsible adult.
- Fair editing. Programme contributors' interviews and contributions must be fairly edited and presented within programmes.
- Fairness and accuracy. Factual programmes should be fair and accurate and not cause unfairness to individuals or organisations. Similarly, dramas and dramas based on fact should not portray facts, events, individuals or organisations in a way which causes unfairness to an individual or organisation.
- Opportunity to respond. Any programme which is critical of, or alleges wrongdoing or incompetence on the part of an individual or organisation should normally give that person or organisation the opportunity to respond. Any relevant response should be included in a manner which is fair.
- Deception in factual programmes. Where any deception is used in the making of factual programmes, such deception should be necessary and be justified by and proportional to the public interest served.
- Deception in entertainment programmes. The use of deception on contributors in entertainment programmes, where there is no public interest, is acceptable subject to certain safeguards but footage cannot be broadcast without the prior informed consent of the subject.

FAIRNESS

[See Section 7 of the Code, at page 36]

Sections 7 and 8 of the Code, dealing with “Fairness” and “Privacy” respectively, are different from other sections of the Code in that they apply to how broadcasters treat individuals and organisations (who may be contributors, willing or unwilling, or non-contributors) that are directly affected by programmes, rather than to what viewers and audiences see and hear.

Since fairness and privacy issues are often closely related, this Chapter should be read in conjunction with Chapter 4D, Privacy.

**GENERAL
REQUIREMENT**

Broadcasters “... must avoid the unjust or unfair treatment of individuals or organisations in programmes” [Rule 7.1].

‘Fairness and Privacy’ Complaints

Any individual (or organisation) who considers him/herself to have been the subject of unjust or unfair treatment or an unwarranted infringement of privacy [see ‘Privacy’ at Chapter 4D] may make a written ‘fairness’ and/or ‘privacy’ complaint to Ofcom after a programme’s broadcast.

Defending these complaints, fairness complaints in particular, is time-consuming and may involve painstaking examination and even disclosure to Ofcom of rushes, correspondence, emails and notes, as well as preparation of a detailed response to all the points raised by a complainant. This will require cooperation between the broadcaster and programme-makers.

If Ofcom entertains a complaint of unfair treatment and/or an unwarranted invasion of privacy, the complainant and broadcaster will normally be permitted to make up to

**FAIRNESS &
ACCURACY**

In programme-making, ‘fairness’ and ‘accuracy’ go hand-in-hand. If a programme is inaccurate, the chances are it will be unfair to people featured or referred to within it. Ensuring programmes are accurate, therefore, is of paramount importance in fairness terms as well as ‘viewer trust’ terms.

Programmes, including dramas, that refer to real people, organisations or events, even indirectly, must be thoroughly and properly researched with material facts checked and, where appropriate, corroborated. In addition, programme-makers should think carefully about who the programme is likely to affect and, in turn, what the effect is likely to be. This will have a direct bearing on who should be consulted and/or approached to contribute to the programme.

two written submissions each (including the initial complaint) in support of their case, after which Ofcom will decide whether there needs to be an oral hearing, in front of the ‘Fairness Committee’; or whether the complaint can be decided simply on the basis of the written submissions. If there is a hearing then at least one of the programme-makers will be expected to attend with the broadcasters’ representatives.

Ofcom will normally publish its final adjudication on its website and if a complaint is upheld, it is also likely to direct the broadcaster to transmit on air and/or publish a summary of its Adjudication. In the case of a serious breach, a statutory sanction may be considered and imposed. The imposition of a sanction and the adverse press that it creates damages the reputation of both the broadcaster and the programme-makers.

Programme-makers must ensure that material facts are not presented, disregarded or omitted in a way that is unfair to an individual or organisation and anyone whose omission could be unfair should be offered an opportunity to contribute. See ‘Opportunity to Respond’ below.

Similarly, fact-based dramas and reconstructions of real events should not portray facts, events, individuals or organisations in a way which is unfair to an individual or organisation. It should normally be made clear whether a programme lays claim to be a dramatised documentary i.e. a faithful reconstruction subject to the same journalistic rigour as a factual documentary, or whether it is merely based on or inspired by real life events.

Fairness issues (as with those relating to privacy) can roughly be divided into those relating to individuals or organisations actually taking part in programmes, i.e. “contributors”; and those not taking part but who are otherwise referred to i.e. “non-contributors”.

**FAIRNESS &
CONTRIBUTORS****GENERALLY**

When individuals or organisations consent to take part in programmes, this does not mean that they waive their rights to being treated fairly and we should normally be fair and straightforward in our dealings with contributors, unless, exceptionally, it is justified to do otherwise, e.g. where it is in the public interest (see below).

**INFORMED
CONSENT**

Contributors should normally take part in programmes on the basis of their informed consent. Informed consent is likely to involve providing contributors with all or some of the following information, at an appropriate stage:

- what the programme is about i.e. the nature, format and subject matter of the programme;
- why the contributor is being asked to contribute and the way in which the contribution is likely to be included;
- whether their contribution will be live, pre-recorded, edited or unedited;
- where and when (if known) the programme is likely to be shown for the first time;
- an outline of the areas of questioning and the nature of other likely contributions, if it would be unfair not to give this information;
- their contractual rights and obligations e.g. whether or not they will have the right to view the programme before transmission and suggest any changes to it; and those of the programme makers and broadcaster. Where appropriate this kind of information should normally be contained within the release form or in a letter or email.

Exactly what information will be necessary to provide to contributors will depend on the circumstances of each individual case and the nature of the programme and contribution. Clearly, a contributor whose appearance is trivial or minor e.g. a brief, spontaneous vox pop on a non-sensitive subject will not expect or require anywhere near as much information as, say, an individual who has agreed to be interviewed at length to answer serious, potentially damaging allegations made against him in the programme.

Note: sometimes programmes evolve and change during the production process. In these circumstances, contributors should be made aware of material changes if it might reasonably alter their decision to take part and cause unfairness. Such changes might include the title of the programme, if this is significant, changes to the timing and location of broadcast, or changes to others that are contributing to

the programme. If this is the case, programme-makers should seek advice from the legal and compliance department before re-approaching contributors.

RELEASE FORMS

Although it is not a requirement of the Code that any of the above information be provided to contributors *in writing*, in most cases, particularly where there is a significant contribution, programme-makers should obtain evidence of the contributor's informed consent in writing. Normally this will be in the form of a signed release form which describes the contribution and sets out the contractual rights and obligations of the parties.

In some cases, it may not be practical to obtain a signed release form and in such circumstances, evidence of informed consent should be obtained on camera i.e. that the contributor understands the nature, format and subject matter of the programme, where it will be shown and that they agree to their contribution being used. If it has only been possible to obtain evidence of consent in this way or producers anticipate this will be the case, they should seek advice immediately from the programme lawyer.

In rare cases, producers may not be able to obtain either a signed release form or have time or the ability to record consent on camera. Wherever this is the case, you must alert as soon as possible the commissioning editor and/or programme lawyer. A decision will then be made as to whether that contribution can be included in the broadcast programme.

Generally, contributors consent to being filmed and their contributions broadcast when they agree to be filmed, on the basis of the information they have been given. Release forms do not constitute the consent itself but, rather, are merely

evidence of consent having been given. To avoid confusion, it may be sensible to ask contributors to sign their release forms before filming takes place.

From time to time contributors may seek to place conditions on their contribution e.g. the interview can only be used within one specific programme; cannot be shown in a particular country, etc.. Programme-makers must be careful not to agree to any conditions they or the broadcaster may have difficulty honouring.

If a contributor places any condition on his/her contribution, which could have a material bearing on the content of the programme or its distribution or sale, this must be referred to the commissioning editor and/or programme lawyer for approval, before being agreed to.

Programme-makers must never offer or give any editorial control to a contributor or any third party.

Where a contribution is significant i.e. endures over a period of time or is likely to infringe the rights of the individual e.g. privacy rights in reality television show formats, it will normally be necessary to agree with the contributor, before filming begins, the nature of the programme and contribution, the parameters of filming and broadcast and the detail of all other contractual rights and obligations of the parties, in the form of a detailed contributor agreement letter.

CONSENT & CHILDREN AND YOUNG PEOPLE

If a contributor is under 16 years of age, programme-makers should normally obtain not only the consent of the child or young person, but also the consent of their parents.

Where parents are estranged or divorced, it will normally suffice to obtain the

consent of the natural parent with custody, depending on the circumstances of the individual case. However, in such circumstances, advice must always be sought from the programme lawyer. If a child's or young person's parents are dead or are not involved in the upbringing of the child, consent should be sought from the adult with legal responsibility for the child's welfare.

Even where a young person has reached 16 but not yet reached adulthood i.e. 18, it may still be appropriate to seek parental consent, depending on the particular circumstances of the young person in question and the nature of the programme and contribution. Depending on the circumstances, advice from your programme lawyer may be appropriate.

If a child/young person is a ward of court or there is any social services involvement, programme-makers should refer immediately to their programme lawyer for advice.

See also 'The Involvement of People Under 18 In Programmes Generally' within Chapter 4D Privacy.

CONSENT & VULNERABLE ADULTS

In the case of people over 16 who are unable themselves to give informed consent e.g. because of disability, consent should be given on their behalf by the adult who has primary care and responsibility for that person. In particular, such individuals should not be asked about matters likely to be beyond their capacity or likely to put them at risk without such consent. It may be necessary to consult with the vulnerable adult's professional adviser, e.g. GP or psychotherapist.

FAIR EDITING

Where a programme is edited, contributions should be edited fairly i.e.

they should not be edited in such a way that misrepresents what the contributor actually said or did, including by omission.

REQUESTS FOR ANONYMITY

A contributor may agree to take part in a programme on the condition that his/her identity is not revealed. It is important for the producers to have a clear agreement with the contributor(s) about how they will appear and the level of disguise required. For example, one contributor may be happy simply for his name not to be given and his face not to be shown, whilst another may require her image and voice to be changed to such an extent that she would be totally unidentifiable, even to close family members.

Some contributors may not be clear about what level of disguise is necessary to ensure their identity is protected. Where this is the case and to avoid any misunderstanding, producers should assess the particular circumstances of the case before deciding what level of disguise is appropriate to protect the identity of the contributor. This should then be carefully explained to the individual so they fully understand and agree how they will appear in the programme and the level to which their identity will be protected. If possible discuss this on camera with the contributor and even show them how they will appear.

A person's identity may be revealed just as easily by what they (or others) say, as by how they look or sound, so it is vitally important that the final programme as a whole achieves the required level of anonymity that has been agreed with the contributor. It may be necessary to edit out certain bits of information i.e. things said by the contributor or others, that inadvertently identify the contributor either on their own or when different bits of information are pieced together (jigsaw identification).

HONOURING GUARANTEES

Guarantees that are given to contributors e.g. relating to programme content, confidentiality or anonymity should normally be honoured. Any deviation should be justified by the public interest or otherwise. Where conditions or guarantees have been stipulated, programme-makers should be clear about exactly what the contributor expects e.g. if a contributor asks for anonymity, do they expect total anonymity i.e. so they are not even recognisable by those that know them well, or simply a disguise that would prevent the wider viewing public from recognising them? Are they concerned about their real voice being heard, for example? It should not be assumed that contributors understand such techniques or how the television production process works. Best practice is to discuss and agree the specifics of this with the contributor on camera and show them an example of how they would appear, if possible.

DECEPTION & SET-UPS

Factual Programmes

There may be rare occasions in factual programme-making where there is justification for being less than totally honest and upfront with contributors. However, this is only likely to be acceptable where it is in the public interest (see 'Public Interest' within Chapter 4D) and the material could not reasonably have been obtained through other means.

As a general rule, the minimum amount of deception should be employed in order to achieve the programme's goals i.e. the deception should be proportionate in all the circumstances. Programme-makers must seek advice and approval from their commissioning editor and programme lawyer before undertaking any such activity. See also 'Surreptitious or Secret

Filming' within Chapter 4D, Privacy.

Entertainment Programmes

Many entertainment programmes involve some sort of deceit or 'set-up' situation, where members of the public or celebrities are filmed without their knowledge e.g. 'candid camera' type stunts, or are filmed for a purpose different to that which they agreed to. In many cases, there will not be any public interest in broadcasting the footage. For this reason, full consent should generally be obtained from the individual or organisation deceived, before the material is broadcast i.e. the material may be filmed but cannot be broadcast without the informed consent of the subject.

Consider the effect of the stunt in advance to determine if the individual's family, partner or friend should be consulted beforehand in order to consider any unforeseen circumstances or to assess the risks associated with filming. [For celebrities/people in the public eye, see below].

Note: in both factual and entertainment programmes, if the person or organisation deceived is not identifiable, it will not normally be necessary to obtain their consent before broadcast.

Ordinary Members of the Public –v– Celebrities

The Code sensibly makes a distinction between ordinary members of the public and celebrities/people in the public eye. In relation to members of the public, broadcasters must obtain the full, informed consent of the person filmed before the footage can be broadcast (unless, of course, there is some public interest justification in broadcasting the material). However, with celebrities and people in the public eye, footage of them can be broadcast without consent and without any public interest justification provided they have not been secretly filmed and as long as the filming

is unlikely to result in "unjustified public ridicule" or "personal distress".

Example. There may be no significant public interest in broadcasting an entertaining sequence showing a particular celebrity who has consented to being filmed but is unaware that they are being duped into endorsing some patently absurd, fictional, charitable cause. The sequence may make the celebrity look naïve, even stupid but so long as broadcasting the footage is unlikely to result in "unjustified public ridicule" or "personal distress" for the celebrity concerned, the footage can be shown. Any "public ridicule" might be justified on the basis that the celebrity in question should have known better. As to what might constitute "personal distress", this means something over and above mere annoyance or upset.

If the person duped was an ordinary member of the public, however, the footage could not be shown without full consent or a public interest justification, regardless of whether the subject of filming should have known better or the likely effect on the subject of broadcasting the material in question.

FAIRNESS & NON- CONTRIBUTORS

GENERALLY

Care needs to be taken with all references within programmes to identifiable individuals and organisations, to ensure they do not cause unfairness. As noted above, allegations or statements of fact need to be accurate, otherwise they are likely to result in unfairness.

OPPORTUNITY TO RESPOND

Seeking an appropriate response from individuals and organisations who are the

subject of significant allegations or criticism is an essential part of the fact-checking process and ensuring accuracy and is a cornerstone of responsible journalism. It is also a regulatory obligation. Section 7.11 of the Code states:

"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".

[See also 'Defamation' at Chapter 5A].

Programme-makers should always seek advice from their programme lawyer when seeking a response on contentious matters.

Method

A response can be sought in a number of different ways e.g. by seeking an on-camera interview; by requesting a written response for inclusion in the programme; or even simply by telephoning the subject, noting the response and fairly including it in the programme. The important points to note are that they are given sufficient information about the arguments and allegations in order to respond properly; all material allegations are put to them; they are given a proper opportunity in which to respond and what they say of relevance is fairly included in the programme. Advice on the content of the letter sent to the subject of the allegations must be sought in advance from the programme lawyer.

In some circumstances, it may be appropriate to seek a response by 'doorstepping' an individual or a representative of an organisation. [see 'Doorstepping' within Chapter 4D, Privacy].

Information

When seeking a response, in most cases, the subject of the allegations should be given:

- a summary of the nature, format and content of the programme (including the title or working title if that is significant);
- information about where the programme is to be broadcast and when (if known);
- a summary of all material allegations and/or criticisms or statements to be included in the programme that could result in unfairness to them; and,
- an invitation to respond by a particular date.

Generally, approaches for a response do not need to set out or explain all the evidence upon which the allegations or criticisms are being made, although in some circumstances it may be appropriate to include some or all of this information and certainly in cases where it would be unfair not to. Note: there is no obligation actually to hand over evidence or, in the case of secret filming for example, to show it to the subject of the allegations, prior to transmission. A proper description of the evidence and the allegations it gives rise to will be acceptable.

Timing

There is no set amount of time that individuals or organisations must be given in which to respond to allegations that are made about them, other than it should be fair, taking into consideration all the circumstances. When deciding how long that should be, the following factors may be considered:

- the nature of the programme and how long the producer has known what the allegations are. Is it a programme that's been many months in the making or a daily news programme reacting to a very recent story?;
- the nature of the allegations and their complexity. Obviously the more detailed and complex the allegations, the longer the subject may need to be able to respond properly; and,
- the resources of the subject to respond to the particular allegations – an ordinary

member of the public may need longer than a large organisation with many personnel at its disposal.

Including a Response within a Programme

Where a 'right of reply' has been offered and a response provided, programme-makers and broadcasters are not obliged to include everything the subject of the allegations says in that response. Clearly, to be fair, it is only necessary to include what is relevant to the allegation(s) or criticism(s) being made. Irrelevant material can be disregarded. Exactly what is included in the final programme is a matter for the programme-makers and broadcaster on the basis of fairness.

Often the best way to represent a response within a programme will be to pick out key quotes and reproduce them either orally, visually or both, rather than paraphrasing, although the latter is perfectly acceptable as long as the meaning is fairly represented.

Where an individual or organisation submits but then withdraws their proposed response, there is still an obligation on the broadcaster to ensure fairness. This does not mean that the response should be included against the person's or organisation's wishes. However, if known, the programme should reflect any material facts about the position of the subject of the allegations and explain the absence of a formal contribution, if it would be unfair not to do so.

NON-APPEARANCES

Individuals or organisations that are approached for a contribution to a programme, whether or not specifically in order to provide a response (see below), may choose to make no comment or refuse to appear. That is their right and

programmes should make clear that the individual or organisation concerned has chosen not to appear and should give their explanation for not appearing, if it would be unfair not to do so.

The refusal of any individual or organisation to take part would not normally prevent a programme or programme item from going ahead.

Representing the Views of Third Parties

Where programmes are representing the views of individuals or organisations that are not actually participating, this must be done fairly i.e. it should be accurate and not be misrepresentative.

Re-Use of Material

When incorporating into a programme archive footage or material which has been filmed or recorded for another programme or purpose, programme-makers must ensure that this does not result in unfairness or an unwarranted infringement of privacy.

Example. If a programme makes potentially damaging allegations about an individual and that individual chooses not to appear or make a comment, the audience may draw an adverse inference e.g. that they have something to hide. However, the person may have a perfectly good reason not to participate, such as that the allegations are the subject of legal proceedings. In such circumstances, the reason for not contributing should be made clear.

Example. It would be unfair to use footage of identifiable teenagers, originally recorded for a news item about GCSE pass rates, in a later item about the problem of teen pregnancies, for obvious reasons. In some circumstances, obscuring people's identities e.g. blurring faces, will suffice in removing any risk of unfairness or infringement of privacy; in others, this may not be sufficient and different footage should be sourced. See also 'Accidental Defamation' with Chapter 5A, Defamation.

FAQs

Q. Does consent always have to be in writing?

A. A signed release form is normally good evidence of a contributor having agreed to take part in a programme but does not remove the need to explain properly the nature of the programme to the contributor. It also is a written record of the terms of the consent e.g. setting out what use the broadcaster can make of the contribution. Wherever possible, therefore, consent should be sought in writing, in the form of a signed release form. However, there may be occasions where this is not possible or impractical. In such circumstances, consent on camera may be sufficient. The best way to approach this is for the producer/director to ask the contributor on camera whether they consent to take part and describe the programme e.g. "Do you consent to your contribution/ interview being included in this programme, called [insert], about [insert] to be broadcast on one of Channel 4/Five's channels and internationally in any media". If you intend in advance to seek consent on camera and dispense with release forms, you must seek the advice and consent of your programme lawyer. See 'Release Forms' above.

Q. When should the contributor sign their release form?

A. The release form may be signed before an individual's contribution or immediately after. It makes no real difference. However, it is generally not good practice to leave it until sometime after a contribution has been given before asking for the release form to be signed. See 'Release Forms' above.

Q. How much do I have to tell a contributor about the programme?

A. This depends on the exact nature of the programme but, generally, contributors should take part in programmes on the basis of their informed consent, that is they should be told everything they need to know to ensure they can make a properly informed choice about whether or not to take part. There may be occasions where programme-makers are allowed to be less than upfront and totally honest with contributors, the most extreme example of this of course being secret filming. However, any use of deception or the withholding of information must be justifiable e.g. by the public interest, and be proportionate. See 'Informed Consent' above.

Q. What does the 'public interest' mean?

A. The 'public interest' means more than simply what the public are or might be interested in. The public may well be interested in the private sexual habits of a famous celebrity but whether it is "in the public interest" for such facts to be disclosed is another matter.

- If an act is done e.g. facts are disclosed in a television programme, and it is said to be "in the public interest" what it means is that it serves beneficially the well-being or interests of the public, or society generally.
- There is no exhaustive definition of what constitutes the 'public interest', but it is generally accepted to include the following:

- Exposing or detecting crime, corruption, antisocial behaviour or injustice;
- Exposing lies, hypocrisy or misleading claims made by individuals or organisations;
- Protecting public health or safety;
- Disclosing incompetence, negligence or dereliction of duty, that affects others;
- Exposing dangerous or exploitative behaviour that could harm others.

See 'Deception and Set-Ups' above and 'Chapter 4D, Privacy.'

Q. Can I agree to allow a contributor to see the programme before transmission and to make changes to his/her contribution?

A. Only very rarely are contributors permitted to see previews of our programmes. Any exception to this rule, for whatever reason, must be approved in advance by the commissioning editor who should seek the advice of the programme lawyer. Where a preview is granted, the terms upon which it is agreed should normally be put in writing – possibly on the release form - to avoid any confusion and it must be made clear that final editorial control remains with the broadcaster. Please refer to the legal and compliance department for advice regarding the exact wording of any promise to show contributors previews of their contribution. Normally, we will only agree to make changes to a programme or a contributor's contribution if he/she can demonstrate that the programme, as it stands, is factually inaccurate.

Note: it is sometimes appropriate to consider allowing a contributor to see a programme made with their full cooperation ahead of broadcast, where it concerns personal matters relating to their life but even then this is not required to achieve fairness.

Q. A contributor is refusing to sign his/her release form. What should I do?

A. The first thing to do is to seek advice from the programme lawyer who will consider carefully all the circumstances, including the arguments of the contributor as to why they are refusing to sign. However, as noted above, release forms do not constitute the consent itself but are merely evidence of consent having been given. If a contributor does not have a good reason for wishing to withdraw and it appears they have merely changed their mind, we are likely to take a robust line and include the contribution without a signed release form.

Q. A contributor is trying to place conditions on taking part in the programme? What should I do?

A. Seek advice from the programme lawyer immediately. You must not agree to any significant conditions e.g. anonymity, or that the programme won't be shown in a certain country, etc. unless the condition(s) asked for are so trivial you feel confident you can agree to them without first seeking the advice of the programme lawyer. It may well be that we will be able to accommodate the contributor's requests but you must check. See 'Release Forms' above.

Q. A contributor has asked to remain anonymous? What can I promise them?

A. First of all, you should ascertain exactly what the contributor means by 'anonymous', as there are degrees of anonymity e.g. not identifiable to the general public or to anyone at all, even close family members? Once this is clear, you must seek the advice and consent of your commissioning editor and programme lawyer, before agreeing to anything.

See 'Requests for Anonymity' above.

Q. Is blurring a contributor's face enough to ensure they are anonymous?

A. It depends on what level of anonymity the contributor requests or the circumstances dictate. In some circumstances, it may be appropriate to alter the individual's voice, change certain characteristics e.g. wear a wig, or even to film the contributor in silhouette. Recently two newspapers were convicted of breaching the Sexual Offences Act (which protects the anonymity of victims of sexual offences) for identifying a woman who was the victim of a sexual assault, even though the photograph they used showed her only from behind, the reason being that her distinctive appearance rendered her identifiable to those that she knew and worked with. A third newspaper, however, which published the same photograph but altered the woman's hair colour was found not to have identified her. This demonstrates that in each case where a contributor requests to remain anonymous (or this is required by law) we should carefully consider what particular measures are necessary to ensure the required level of anonymity. See 'Requests for Anonymity' and 'Honouring Guarantees' above.

Q. Is it necessary to offer a "right of reply"?

A. It will be necessary to seek an appropriate response from a person or organisation whenever there are significant allegations or criticisms or any sort of damaging critique of an identifiable individual or organisation. This is likely to be necessary for accuracy, fairness and also potentially for legal reasons e.g. to help defend any threat of libel proceedings. See 'Opportunity to Respond' above. See also 'Defamation' at Chapter 5A.

Q. Do I need to offer an interview (where a person or organisation is criticised)?

A. No, not in every case. It is the broadcaster's final decision how a person or organisation is given the opportunity to respond to allegations or criticisms in a programme and how their response is included within the programme. As noted above, what is important is that the subject is given sufficient information about the programme, is told what the allegations are and is given a proper and timely opportunity to respond and that any response is fairly included in the programme to reflect fairly their position. See 'Opportunity to Respond' above.

Q. Do I need to include everything they say (where a right to reply has been sought and received)?

A. No. We only need include what is relevant and what fairness dictates should be included. Often programme-makers will receive page after page of irrelevant material in answer to a particular allegation. Your programme lawyer will advise you on what needs to be included. See 'Opportunity to Respond' above.

4D. PRIVACY

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KEY POINTS

- Any infringement of privacy of an individual or organisation in programmes, or in connection with obtaining material included in programmes, must be warranted. Normally such justification will either be that the individual/organisation has consented or that the public interest 'outweighs' the privacy infringement.
- Consent. Most filming (in addition to the broadcast of the material) involves an infringement of privacy and, therefore, should normally be done with the consent of the subject, either evidenced in a signed release form, or recorded on camera. Even when filming in public and semi-public places, individuals caught on camera may have a reasonable expectation of privacy if their actions are of a private nature or, for example, they are in a state of distress.
- Suffering and distress. When reporting or referring to emergencies, accidents or moments of personal tragedy, the public interest in full, open and accurate reporting and right to freedom of expression must be carefully balanced with the need to be compassionate and the privacy rights of those involved, so as to avoid any unwarranted invasion of privacy.
- 'Doorstepping' or interviews without prior arrangement are likely to amount to a serious infringement of privacy and should not take place unless an interview has been refused, it hasn't been possible to request an interview or it's likely that contacting the subject will frustrate the purpose of the programme. Programme-makers must seek advice from their programme lawyer before attempting a doorstep.
- Secret filming and recordings. All secret filming and recording (except for entertainment purposes) must comply with rule 8.13 of the Code and be justifiable by the public interest. There are detailed rules which all programme-makers must follow, having taken early advice from their designated programme lawyer.
- Secret filming for entertainment purposes where there is no public interest should only be undertaken where it is editorially justified and unlikely to cause annoyance, distress or embarrassment. In addition, informed consent must be given by the subject of the filming before the material can be broadcast. Programme-makers must seek advice from their programme lawyer before undertaking any such filming.
- Revealing private information about an individual or organisation without consent, whether or not they have taken part in a programme, is likely to infringe privacy and is only likely to be justifiable if the public interest in revealing the information 'outweighs' the privacy infringement.
- Broadcasters must pay particular regard to the privacy of people under 16. Those under 16 do not lose their right to privacy because of the fame or notoriety of their parents.

PRIVACY

[See Section 8 of the Code, at page 41]

As noted above, Sections 7 and 8 of the Code, dealing with "Fairness" and "Privacy" respectively, are different from other sections of the Code in that they apply to how broadcasters treat individuals and organisations (who may be contributors, willing or unwilling, or non-contributors) that are directly affected by programmes, rather than to what viewers and audiences see and hear.

Since fairness and privacy issues are often closely related, this Chapter should be read in conjunction with Chapter 4C, Fairness.

GENERAL REQUIREMENT

The Code contains the following rule: *"Any infringement of privacy in programmes or in connection with obtaining material included in programmes,*

Fairness and Privacy Complaints

Any individual (or organisation) who considers him/herself to have been the subject of unjust or unfair treatment [see Fairness at Chapter 4C] or an unwarranted infringement of privacy may make a written 'fairness' and/or 'privacy' complaint to Ofcom after a programme's broadcast.

Defending these complaints, fairness complaints in particular, is time-consuming and may involve painstaking examination and even disclosure to Ofcom of rushes, correspondence, emails and notes as well as preparation of a detailed response to all the points raised by a complainant. This will require cooperation between the broadcaster and programme-makers. If Ofcom entertains a complaint of unfair treatment and/or an unwarranted invasion of privacy, the complainant and broadcaster will normally be permitted to make up to two written submissions each

must be warranted" [Rule 8.1].

Thus, broadcasters must be able to demonstrate why any infringement of privacy is justified. In most cases, such justification will either be that the individual has consented or that the public interest outweighs the privacy infringement.

CONSENT

Most contributors take part in programmes on the basis of their informed consent (see Chapter 4D, Fairness, 'Informed Consent'). Often, as part of that consent, contributors agree to their privacy being infringed in some way e.g. when they agree to have a camera pointed at them, allow cameras into their homes or, in the case of some reality shows, agree to be filmed 24 hours a day.

However, in many cases, individuals will not have consented to any infringement of their privacy and, in some cases, may

(including the initial complaint) in support of their case, after which Ofcom will decide whether there needs to be an oral hearing, in front of the 'Fairness Committee'; or whether the complaint can be decided simply on the basis of the written submissions. If there is a hearing then at least one of the programme-makers will be expected to attend with the broadcasters' representatives.

Ofcom will normally publish its final adjudication on its website and if a complaint is upheld, it is also likely to direct the broadcaster to transmit on air and/or publish a summary of its Adjudication. In the case of a serious breach, a statutory sanction may be considered and imposed. The imposition of a sanction and the adverse press that it creates damages the reputation of both the broadcaster and the programme-makers.

vigorously oppose it e.g. where individuals are secretly filmed or recorded [see 'Surreptitious or Secret Filming below] and are exposed doing some criminal or antisocial act; or, in relation to programmes that delve into individuals' private lives and reveal information of a private nature (see 'Revealing Private Information' below). In such cases i.e. where there is an infringement of privacy but no consent, the filming and broadcasting of such material should be justified by the public interest. Similarly, any decision to withhold information from contributors or to act other than in a totally honest and upfront way, should be justified by the public interest. See Chapter 4C, Fairness, 'Deception and Set-Ups'.

Note: some contributors may consent to take part in programmes but place conditions on their contribution e.g. they wish to remain anonymous. It is important that producers do not agree to conditions that they or the broadcaster may have difficulty in complying with. In addition, where conditions in relation to a contribution are agreed to, it is vitally important that all parties are clear about the exact nature of the condition. See 'Honouring Guarantees' and 'Requests for Anonymity' at Chapter 4C, Fairness.

PUBLIC INTEREST

If the broadcast of a television programme is said to be "in the public interest" it means that it serves beneficially the well-being or interests of the public or society generally. There is no exhaustive definition of what constitutes the public interest, but it is generally accepted to include the following:

- Exposing or detecting crime, corruption, antisocial behaviour or injustice;
- Exposing lies, hypocrisy or misleading claims made by individuals or organisations;

- Protecting public health or safety;
- Disclosing incompetence, negligence or dereliction of duty, that affects others;
- Exposing dangerous or exploitative behaviour that could harm others.

Any act that relies for its justification on the public interest should be proportionate to the interest served i.e. in relation to privacy, the more significant the infringement, the greater the public interest will need to be in order to justify it.

Privacy issues (as with issues of fairness) can roughly be divided into those relating to individuals or organisations actually taking part or featured in programmes, i.e. "contributors"; and those not taking part but who are otherwise referred to i.e. "non-contributors".

PRIVACY & CONTRIBUTORS

GENERALLY

The extent to which contributors waive their rights to privacy when consenting to take part in programmes clearly depends on the nature of the contribution. However, it should always be made clear to potential contributors before they agree to take part the extent to which filming will or is likely to infringe upon their privacy. For example, in some reality programmes, where contributors are filmed 24 hours a day, there is a very significant infringement of privacy so this is always made absolutely clear to potential contributors in advance and they expressly agree to it.

WHEN IS EXPLICIT CONSENT NECESSARY?

As noted above, contributors should normally take part in programmes on the basis of their informed consent and, in most cases, should sign a release form evidencing their consent. See Chapter 4C,

Fairness, 'Informed Consent'. However, there will be situations, particularly when shooting on location, where individuals other than the main contributors will inadvertently be caught on camera. The question then arises whether or not there is an obligation to seek the explicit consent of those filmed, as an individual's privacy could be infringed by being filmed in certain circumstances and broadcasting that footage may be a further and separate infringement. This will generally depend on a number of factors including: the location where the filming takes place; the nature of what is caught on camera i.e. the actions, behaviour or words that are recorded; and, sometimes, who the individual concerned is e.g. whether they're a member of the public or someone in the public eye.

FILMING IN PUBLIC AND SEMI-PUBLIC PLACES

When filming in public places e.g. on the streets, in parks, on public highways, and semi-public places e.g. shops, bars, institutions, programme-makers are only likely to need to obtain the express consent of those that make a significant contribution e.g. those that the camera is following or that speak to camera or whose words are caught on camera, unless what they say is trivial and inconsequential. Generally, you will not need to obtain the express consent of random people that are merely passing by or who are caught on camera in the background unless they are to be shown in a negative or pejorative context, thereby requiring consent or the concealing of identities e.g. by pixelation.

However, there will be circumstances where individuals, even in public places, have a legitimate expectation of privacy e.g. when they are in distress or receiving medical treatment, and to film and, furthermore, to broadcast such footage would amount to an unwarranted infringement of their privacy. In such

circumstances, in the absence of any public interest justification, it is unlikely that the footage could be broadcast without the express consent of those filmed or their identity being obscured.

If an individual's or organisation's privacy is being infringed by filming and they ask that filming or recording stop, film-makers should normally comply, unless it is warranted to continue e.g. it is in the public interest.

When filming on private property, even where it is open to the public e.g. shops, bars, shopping malls etc., programme-makers should, wherever possible, first obtain the consent of the legal owner or person in charge of the location to film there, unless there is justification for not doing so. Often consent may be granted but subject to certain conditions e.g. seeking the individual consent of staff or members of the public caught on camera, which if agreed to should be honoured.

When filming on private property, if the owner or person in charge requests that filming stop, this should normally be complied with unless there is good reason not to e.g. the public interest justifies continuing. Where this occurs, inform the programme lawyer as soon as possible thereafter as a trespass may have been committed.

In some semi-public places, where there is a greater expectation of privacy and particularly where people may not wish to be caught on camera e.g. doctors' waiting rooms, it may be appropriate (and, as above, it may be a condition of filming there) to alert members of the public to the fact that filming is taking place e.g. by erecting a sign (or making an announcement) stating that filming is taking place, explaining briefly what the programme is about and advising anyone that does not wish to be filmed to avoid

the camera or alert a member of the production team.

'SENSITIVE' PLACES/SITUATIONS

Filming in sensitive places e.g. in hospital wards, ambulances, A&Es, schools, prisons, police stations etc., (unless undercover in which case see 'Deception and Set-Ups' at Chapter 4C, Fairness, and 'Surreptitious or Secret Filming' below) is only likely to be possible after negotiation with the person or organisation in charge of the location in question. However, even where consent is granted, careful consideration must be given to the

Example. You are filming with a group of young men who are having a night out on the town and you are following them as they visit city centre bars on a Friday night. All of the group are filmed extensively, including interacting with others whilst out and about. The filming is unplanned and you don't know where they are going next. What consents are you likely to need?

You will need the express consent of all the members of your main group, preferably in the form of a signed release form. If they meet up with any other friends who tag along, then it is likely you will need to obtain their express consent too, as they are likely to be filmed extensively.

Say, for example, the group interacts with some passing girls on the street, perhaps chatting them up. If the exchange is fleeting you probably will not need the girls' express consent. If the exchange is more prolonged or is of a more private or sensitive nature e.g. sexual, then express consent is likely to be advisable, either in a release form or consent on camera.

People seeing the camera may come up and shout something or make a rude gesture. In the majority of such cases, you

individual fairness and privacy rights of those that are caught on film. The fact that general permission to film has been given does not necessarily mean that individuals have consented to being filmed in any way and that footage can be broadcast.

Depending on the circumstances, it may be that alerting individuals or members of the public through the use of signs or announcements, as above, will suffice but, in certain circumstances, where there is a greater expectation of privacy, it may be appropriate or essential to seek the individual consent of each and every person shown or, if that is not possible, conceal their identities on broadcast.

would not need express consent, as you are filming in a public place and they have knowingly put themselves in the position of being filmed.

Perhaps the group enter a bar or a fast food takeaway restaurant. Can you film inside? You should first try to obtain consent to film from the owner or person in charge. If they refuse, then you cannot film inside but you could continue to film outside. If you are able to film inside, try to obtain the explicit consent of anyone you film speaking to camera or of those whose words are caught on camera, unless what they say is trivial. As above, you are unlikely to need to obtain express consent from those in the background.

Note: if the filming had been planned in advance, then it would be advisable to contact locations in advance to clear all filming. In addition, this sort of filming might be the sort that would favour seeking consents on camera, rather than trying to get people to sign release forms.

Also note that if any of the contributors are under 16 (and sometimes under 18), parental consent is normally also likely to be required.

Wherever there is an intention to film in a sensitive place or there is doubt about whether or not individual consents are required, please seek early advice from the programme lawyer.

If a programme is of a sensitive nature, clearly contributors will need to be made aware of the context in which they will appear e.g. if a programme is about date rape, those filmed should be informed when they are giving consent.

THE INVOLVEMENT OF UNDER 18S IN PROGRAMMES GENERALLY

The Code states that due care must be taken over *"the physical and emotional welfare and the dignity of people under 18"* who take part in or are otherwise involved in programmes, irrespective of parental or other consent and that they must not be caused *"unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes"*.

In other words, just because parents may be willing to allow their child to take part in a particular programme, in a particular way, does not absolve the programme-makers and broadcaster from their responsibility to ensure that those under 18 are not put at unnecessary risk and do not suffer harm as a result of taking part in programmes.

OFCOM GUIDANCE ON THE PARTICIPATION OF UNDER 18S IN PROGRAMMES

In December 2007, following widespread consultation, Ofcom published guidance to broadcasters about the participation of young people in programmes, to help ensure that their welfare *"... is at the heart of editorial and production decisions"*. The guidance in full can be found on Ofcom's website (www.ofcom.gov.uk). It reflects already established protocols and procedures put in place by both Channel 4 and Five

when commissioning programmes featuring young people.

As with other guidance Ofcom publishes in relation to its Code, the guidance does not itself form a set of rules which broadcasters are obliged to follow. In its own words: *"... this guidance is non-binding. It is provided to assist broadcasters interpret and apply the Broadcasting Code ... Every complaint or case will be dealt with on a case by case basis according to the individual facts of the case"*. However, when deciding whether the Code has been breached in relation to the participation of under 18s within programmes, Ofcom will consider whether this guidance is relevant and, if it is, will look to see whether the guidance has been followed and, if it has not, will consider why not. A summary of the guidance follows.

Depending on the genre of the programme, the subject matter, the level of participation and, of course, the particular child or young person involved, recommended steps may include:

- The development of clear guidelines for programme-makers on projects that involve under 18s;
- Making appropriate background checks on the under 18s' social, family, health and educational circumstances (which may include a detailed risk assessment);
- Ensuring there is appropriate communication to under 18s to ensure they are fully informed about the likely outcomes of participation;
- Highlighting to parents/guardians the positive and negative outcomes of participation in the programme e.g. risk of bullying at school, so that they can better help their child to understand what participation means;

- Seeking advice from appropriately qualified professionals e.g. a counsellor, psychologist;
- Providing a single, consistent point of contact to liaise throughout the production (and beyond, as appropriate) to oversee the child's welfare;
- A careful consideration of the programme's format and its likely impact on the individual child/young person.

Thus it is important that wherever under 18s are to feature prominently within programmes, particularly where their participation may involve a significant infringement of privacy, or where the subject matter of the programme or contribution could be deemed to be sensitive, that early advice is sought from the programme lawyer.

PRIVACY OF PEOPLE UNDER 16

Broadcasters are required to pay particular regard to the privacy of people under 16 (see s.8.20 of the Code), whether they are a contributor to a programme or not. They do not lose their rights to privacy because of who their parents are i.e. the child of a very famous celebrity should be accorded the same rights to privacy as the child of an ordinary member of the public, unless the child has courted publicity or is a celebrity in his/her own right.

Unless it is warranted to proceed otherwise, parental consent must be sought where an individual under 16 is featured in a programme in a way that infringes his/her privacy. The explicit consent of the individual concerned should also be obtained where possible.

Ideally, both parents' consents should be sought for the child's contribution. However, this will not always be possible or practicable. If a young person's parents

are divorced or separated, parental consent should, in the first instance, be sought from the parent the child resides with and who has 'parental responsibility'. As to whether or not consent should be sought from the other parent as well, seek advice from the programme lawyer. Child performance licences, issued by the local authority where the child resides, may also be required. See 'Child Performance Licences', Chapter 6E.

VULNERABLE ADULTS

The same principles apply to vulnerable people, in such circumstances, consent should be sought from that person's primary adult carer.

Furthermore, people under 16 and vulnerable people should not normally be asked questions about private matters without the consent of one of their parents or guardian; or, in the case of a vulnerable person, without the consent of their primary adult carer, unless it is warranted to proceed without such consent.

Note: the Code also contains a specific provision that prizes aimed at children in competitions must be appropriate to the age range of both the target audience and the participants. This rule exists to prevent children being placed under an inappropriate amount of stress e.g. young children competing to win large cash prizes for their parents.

See also Chapter 4H, *Commercial References & Sponsorship*, 'Competitions'.

PRIVACY & NON-CONTRIBUTORS

REVEALING PRIVATE INFORMATION

An individual's privacy may be infringed by revealing to a wider audience private information about them e.g. details of their sex life or family life, regardless of whether

or not they are filmed. For example, a divorced spouse who is talking about intimate details of his/her former marriage may be infringing the privacy of his/her former spouse and any infringement must be warranted. Once again, any infringement of privacy must be justifiable in the public interest. The right to freedom of expression coupled with the public interest should 'outweigh' the privacy right that is being infringed.

What amounts to "private information" and whether revealing it, or repeating it, would constitute an unwarranted infringement of privacy depends on a number of factors, which normally would include: the nature of the information; whether or to what extent the information is already in the public domain and, if it is, how it got there; and whether the individual concerned is an ordinary member of the public or is a celebrity or someone in the public eye.

The Code recognises that people under investigation and those in the public eye and their immediate family and friends retain the right to a private life although private behaviour can raise issues of legitimate public interest e.g. there may be an overriding public interest in exposing and exploring publicly in a television programme the private life of a politician, if that conflicts with, adversely affects or raises serious questions about his/her public life.

'DOORSTEPPING'

In Factual Programmes

'Doorstepping' means filming or recording an interview or attempted interview with someone, or announcing that a call is being filmed or recorded for broadcast, without any prior warning. Inevitably, it will involve an infringement of the privacy of the person being approached and should only be undertaken after careful thought and in

the following circumstances, where:

- an interview has been refused repeatedly; or
- it hasn't been possible to request an interview; or
- there's good reason to believe that contacting the subject will frustrate the purpose of the programme; and,
- in all the circumstances doorstepping is justified i.e. the public interest outweighs the infringement of privacy.

Programme-makers should always seek advice from their programme lawyer before attempting to 'doorstep' anyone. Careful consideration needs to be given to exactly how the 'doorstep' should be carried out. For example, the security of the crew must be considered, as should the risk of infringing the privacy of innocent third parties e.g. family members. For this reason, it will generally be preferable not to 'doorstep' people at their homes.

The above rules do not generally apply to attempts to interview or interviews with people in the news in public places e.g. approaching a politician on camera outside Parliament, situations involving media scrums.

In Entertainment Programmes

In entertainment programmes, the above rules do not need to be followed. However, safeguards should be put in place in order to avoid offence and any unwarranted infringement of privacy. In addition, the material will not be able to be broadcast without the full informed consent of the individual 'doorstepped' or filmed.

IDENTIFYING WHERE PEOPLE LIVE

Information which discloses the precise location of where people live, including celebrities, should not normally be revealed unless it is warranted to do so

e.g. they have consented, the information is already widely known, or it is in the public interest to do so.

Note: it may be possible to show the house where a particular individual lives without actually identifying where it is i.e. not giving the house number or naming the street.

RE-USE OF MATERIAL

When incorporating into a programme archive footage or material which has been filmed or recorded for another programme or purpose, programme-makers must ensure that this does not result in an unwarranted infringement of privacy, or cause any unfairness.

RECORDING TELEPHONE CALLS

It is generally accepted that programme-makers may record telephone calls, without telling the person they are speaking to that the call is being recorded, for research or evidential purposes. However, if the call is being recorded with a view to it being broadcast, the following rules apply:

- Recorded telephone calls may be broadcast as long as, at the start of the call, the programme-maker has identified who they are (e.g. given the name of the person calling, the programme and broadcaster), explained the purpose of the call and stated that the call is being recorded for possible broadcast. At this point, the person has the choice to terminate the call if they wish, so if they continue to talk, it may be assumed they have consented to the call being broadcast.
- Some or all of the above information may be withheld and the recorded call still broadcast if, in all the circumstances, it is warranted e.g. it's justified by the public interest

[see 'Surreptitious or Secret Filming' below].

- If a call has been recorded and the other party was not told because, at the time, it was not intended for broadcast but it later transpires the programme-makers do wish to broadcast it, consent should be sought from the other party unless it is warranted to broadcast the call without consent e.g. it is justified by the public interest or the person is not reasonably identifiable.

SURREPTITIOUS OR SECRET FILMING

The following detailed rules must be followed. In addition, seek advice from your programme lawyer from the earliest stage secret filming is contemplated.

All secret filming and recording (including recording telephone conversations and also where a subject does not realise that a visible camera is actually recording) must comply with section 8.13 of the Code and be warranted, unless it is for entertainment purposes, in which case see 'Secret Filming for Entertainment Purposes' below.

The term "secret filming" will be used for ease of reference but it is intended to cover all covert or surreptitious filming or recording.

What constitutes secret filming?

Secret filming includes the following:

- filming or recording material through the use of hidden cameras and microphones;
- filming or recording material through cameras and/or microphones of which the subject is unaware e.g. using long lenses, small cameras, radio microphones, filming from across the street.
- continuing to film or record when the subject of filming believes the camera/microphone is switched off or not going

to be used for broadcast.

- recording telephone conversations for broadcast without consent.

How secret filming is used

Secret filming is generally used in one of two ways:

- in factual programmes, as a journalistic, investigative tool, exposing and evidencing issues which are in the public interest; or,
- in entertainment programmes, where the secret filming is an integral part of the programme providing the comedy/entertainment e.g. a 'candid camera' style programme.

Secret filming of itself, is an infringement of the privacy of the individual or organisation recorded. There will be an infringement of privacy both when the filming takes place and a separate, additional infringement if and when the material is broadcast.

In the case of factual, investigative programmes, such infringements must be warranted, which generally means in the public interest. In entertainment programmes, where no public interest exists, broadcast can only go ahead and broadcast with the informed consent of the individual secretly recorded.

Secret filming for non-entertainment purposes

Programme-makers making programmes for Channel 4 should refer to and follow Channel 4's Secret Filming Rules at Appendix 7C. Programme-makers making programmes for Five should refer to and follow Five's Secret Filming Rules, at Appendix 8C.

Broadcasting secretly recorded material for **non-entertainment purposes** is a two-stage process:

1. Before filming takes place.

- The programme-makers must identify who is to be secretly filmed and why.
- The purpose of the secret filming should not be a 'fishing expedition' i.e. there should already be some evidence which suggests behaviour or actions of the proposed subject that it is in the public interest to expose or uncover by secretly filming.
- There should be reasonable grounds to suspect that secretly filming will reveal further material evidence.
- Secret filming should be necessary i.e. the material could not reasonably be obtained through other means e.g. by filming openly.
- All secret filming must be approved in advance in writing by the broadcaster unless there are exceptional circumstances. Requests should be made in reasonable time with each broadcaster's rules on secret filming – see Appendices. If the commissioning editor and programme lawyer consider the request to be acceptable, the commissioning editor will submit it for approval to the relevant senior programming executive. Programme-makers will then be informed whether or not their request has been approved and they can go ahead and secretly record and whether there are any conditions attached.

2. After filming has taken place.

- Material obtained through secret filming must be carefully considered and evaluated. It can only be broadcast if there is an overriding public interest. Often it will be in the public interest and the material will be able to be broadcast. However, there will be occasions where, although originally carrying out the secret filming was justified, it did not reveal what was anticipated and there will be no public interest in

broadcasting what was recorded. In such cases the material must be stored securely or destroyed.

● Before any secretly filmed footage can be broadcast, this must be approved in writing in accordance with Channel 4's and Five's internal compliance procedures. Again, requests should be made in plenty of time. The request to broadcast secretly filmed material should comply with each broadcaster's rules on secret filming – see Appendices 7C and 8C. If the commissioning editor and programme lawyer consider that there is justification for including the secretly recorded material in the broadcast programme, the commissioning editor will submit the request to the relevant senior programming executive for approval. Programme-makers will then be informed whether or not their request has been approved and the footage can be included in the broadcast programme.

Note: the same procedures will be followed where secretly recorded material has been undertaken by others (including CCTV footage). Where there are privacy issues, broadcast must still be justified by the public interest.

Secret Filming for Entertainment Purposes

Secret filming for entertainment purposes, where there is no public interest, can be undertaken where it is editorially justified and is unlikely to cause "significant annoyance, distress or embarrassment". However, it cannot be broadcast without the informed consent of the subject. If they refuse consent, the material will not be able to be broadcast.

Where a person so filmed is unidentifiable, consent will not normally be required.

Care must be taken where individuals are to be secretly recorded for entertainment programmes within a live programme and

safeguards must be put in place in order to avoid offence and prevent unwarranted infringements of privacy.

Any proposal to secretly record someone for entertainment purposes must be approved in advance by the commissioning editor and programme lawyer. In the case of live programmes, any proposal to secretly record will be referred up in accordance with Channel 4's and Five's internal compliance procedures.

Where a subject who is being secretly filmed for entertainment purposes realises he/she is being secretly filmed and asks for filming to cease, this should be complied with.

SUFFERING & DISTRESS

EMERGENCIES, ACCIDENTS & PERSONAL TRAGEDY

When reporting on emergencies, accidents and/or personal tragedy or making references to such events within programmes, the public interest in full, open and accurate reporting and the right to freedom of expression must be carefully balanced with the need to be compassionate and the privacy rights of those involved, so as to avoid any unwarranted infringement of privacy or unjustified offence.

People caught up in such events e.g. victims, should only be shown where there is strong editorial justification and broadcast is in the public interest, or those filmed have consented to be filmed for broadcast.

People in distress e.g. victims or the grieving relatives of victims, should not be placed under any pressure to be interviewed or to be filmed. It may be appropriate to make any requests for

interviews through an intermediary e.g. a relative, friend or advisor.

Showing people dying, being killed or murdered, particularly the point of death, will require exceptional justification and must be justified editorially, by the public interest and, in relation to the potential effect on viewers, by the context. See Chapter 4A, Harm and Offence, 'Context'.

Where people have died or are the victims of accident or violent crime, programmes should be careful not to reveal their identity, unless and until it is clear that their next of kin have been informed. Any exception to this rule must be justified by the public interest or otherwise e.g. if immediate publication of the deceased's identity might help in the apprehension of a criminal; or, identification was necessary in order to properly identify the deceased.

REVISITING PAST EVENTS

When making and broadcasting programmes, including dramatisations, that concern real, past events that have involved trauma to individuals e.g. natural disaster, accident, human violence, crime etc., programme-makers and broadcasters should always carefully consider the likely impact on those involved e.g. any victims or their close relatives.

Where reasonably practicable, those whose experience is to feature, or their close family, should normally be informed of the plans to make such a programme, including when it will be broadcast, even where the events or material to be broadcast are in the public domain and are widely known and where victims are not named but would be recognisable from the events.

FAQs

Q. Is explicit consent needed from people inadvertently caught on camera e.g. passers-by?

A. Generally not but it depends where you are filming. If you are filming in a public place e.g. on the street, it is most unlikely you will need to seek the specific consent of passers by caught on camera. The only circumstances where consent would be required is if the actions or words of the person caught on camera indicate that person would have a reasonable expectation of privacy and to broadcast their image/words would amount to an unwarranted infringement of their privacy. In semi-public places e.g. shops, malls, bars etc. similar considerations apply. In locations where people would have a greater expectation of privacy e.g. a hospital ward, doctor's waiting room, police station etc., consent may well be advisable and even necessary. If in doubt, seek advice from the programme lawyer.

Q. Can I record telephone conversations?

A. It is generally accepted that programme-makers may record telephone calls, without telling the person they are speaking to that the call is being recorded, for research or evidential purposes. However, if the call is being recorded with a view to it being broadcast, then special rules apply.

If you intend to include the recording within a programme you should tell the person you are speaking to at the start of the call that you are recording it with the intention of including it within a broadcast television programme. You should give sufficient information for them to be able to make an informed choice about whether they wish to continue with the call. Always seek advice from your programme lawyer wherever you intend to record a telephone conversation with a view to including it within a programme.

If you record a telephone conversation covertly with the intention of including it in a broadcast programme, then this will constitute secret filming and you must comply with Channel 4's and Five's rules and procedures relating to secret filming – see Appendices. [See also 'Surreptitious or Secret Filming' above.](#)

Q. What does the public interest mean?

A. The 'public interest' means more than simply what the public are or might be interested in. The public may well be interested in the private sexual habits of a famous celebrity but whether it is in the 'public interest' for such facts to be disclosed is another matter.

If something is done e.g. facts are disclosed in a television programme, and it is said to be "in the public interest" what it means is that it serves beneficially the well-being or interests of the public, or society generally.

There is no exhaustive definition of what constitutes the public interest, but it is generally accepted to include the following:

- Exposing or detecting crime, corruption, antisocial behaviour or injustice;
- Exposing lies, hypocrisy or misleading claims made by individuals or organisations;
- Protecting public health or safety;
- Disclosing incompetence, negligence or dereliction of duty, that affects others;
- Exposing dangerous or exploitative behaviour that could harm others.

4E. RELIGION

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KEY POINTS

- Fairness and accuracy. Religious programmes require careful and responsible handling. They must always be fair and accurate.
- ‘Abusive treatment’. The beliefs and practices of any religious groups featured in programmes must not be misrepresented or abused.
- Transparency. The identity of any religion featured and the purpose of the programme or any programme item should be clear to viewers. Religious views must not be promoted by stealth.
- ‘Special powers and abilities’. Claims that living individuals or groups have special powers or abilities should be considered with due objectivity and avoided in programmes when significant numbers of children are likely to be watching.
- ‘Direct appeals’. Religious programmes should not make direct appeals to viewers to join a particular religion i.e. directly seek recruits.
- ‘Exploitation’. Religious programmes should not improperly exploit any susceptibilities of the audience.

RELIGION

[See Section 4 of the Code – Religion, page 22]

The following rules apply to religious programming only, i.e. any programme where religion is the main subject, or amounts to a significant part of it, which could include, but is not limited to current affairs, documentary or history programmes. It does not include comedy programmes or drama or general entertainment programmes which are clearly non-religious in nature.

Religion is central to many people's lives and is capable of arousing strong views and emotions. Thus, religious programming will always need careful and responsible handling.

Religious programmes should always be fair and accurate and the beliefs and practices of any religious groups featured must not be misrepresented or abused.

In addition, the following rules apply to religious programming:

TRANSPARENCY

Religious programmes should make clear to viewers the identity of any religion featured and the purpose of the programme. Religious views must not be promoted by stealth.

Viewers should be clear about what they are seeing, i.e. what the programme is about and who is appearing or addressing them and what their purpose is so there can be no suspicion that a programme is attempting to promote subversively the views or beliefs of any particular religion.

DUE OBJECTIVITY

Religious programmes should treat claims that living individuals or groups have special powers or abilities with due objectivity.

In any event, such programmes must not be broadcast when significant numbers of children are likely to be watching. This rule exists to protect the vulnerable, particularly from those that might claim to have special powers or abilities in order to encourage people to support them, e.g. financially. This rule does not apply to the founders of recognised religions and/or belief systems, e.g. Jesus Christ, Mohammed, Buddha.

ABUSIVE TREATMENT OF RELIGIOUS VIEWS & BELIEFS

The abusive treatment of people's religious views and beliefs must be avoided.

Programmes which, deliberately or otherwise, undermine, ridicule or disparage the views and beliefs of particular religions are prohibited. This rule would not prevent programmes from questioning or even making critical or negative comments about certain aspects of religion, e.g. about the interpretation of religious doctrine, as long as the subject matter was handled responsibly and the programme or item was fair and appropriately balanced. However, any programme containing such material must be referred at an early stage to the programme lawyer for advice.

DIRECT APPEALS

Religious programmes should not make direct appeals to viewers to join a particular religion, i.e. directly seek recruits. References to the positive benefits of being a member of a particular religion are unlikely to be problematic.

AUDIENCE EXPLOITATION

Religious programmes should not improperly exploit any susceptibilities of the audience.

For example, improper exploitation would be likely to include comments that suggested that if viewers did not subscribe to a particular religion, negative consequences would follow. Generally, soliciting contact from viewers who are interested in furthering their knowledge or understanding of a religion, or a particular aspect of it, following a programme would not constitute "improper exploitation".

See also Chapter 4A, Protection of Under 18s & Harm and Offence – 'Discriminatory Treatment or Language'.

FAQs

Q. Can programmes criticise religions or religious views?

A. Yes. However, the important thing to remember is that if the content of the programme concerns religion or religious beliefs, the subject must be approached with a proper degree of responsibility and religious views and beliefs should not be subjected to an “abusive treatment”.

What amounts to a “... *proper degree of responsibility* ...” will clearly depend on the programme’s content but would include actions such as giving viewers clear information as to what they are about to watch, being clear as to who the contributors are and why they are being included, making sure views that are expressed are open to challenge and generally including an appropriate balance of opinions.

As to the question of what amounts to an “abusive treatment”, Ofcom currently gives no guidance on this but it is clear that gratuitous insults and ill-informed or denigratory comments in connection with the religious views and beliefs of individuals and groups would be problematic.

However, carefully researched, balanced programmes which seek to analyse critically religions and their associated belief systems, even if potentially controversial, are unlikely to be considered to amount to an “abusive treatment” and would not therefore be likely to breach the Code.

Q. I don’t think the contents of my programme amount to an “abusive treatment” but they are bound to cause offence to some. Is this acceptable?

A. As always with matters of offence, context is key. Any programme that takes a controversial approach to such matters as religious beliefs obviously has the potential to cause offence. Ofcom requires material which may cause offence to be justified by the context which includes, but is not limited to, the editorial content of the programme, the service on which the material is broadcast, the likely expectation of the audience and the information given to any potential viewer. See Chapter 4A, Protection of Under 18s & Harm and Offence.

Q. If a contributor talks about their religion or religious views does that mean they are being promoted?

A. What regulation in this area seeks to prevent is the promotion of religious views or beliefs by “stealth”; in other words, programming that purports to be one thing but ultimately intends to acquire converts to a belief-system by not revealing its true intention. So, as long as it is clear to viewers who is addressing them and what particular religion or denomination they represent, it is unlikely Ofcom would regard the programme as amounting to a breach of the Code.

Q. Can I make jokes about religion?

A. In short, yes, but subject to the general requirements of the Code relating to harm and offence, i.e. that material which may cause offence must be justified by the context.

Remember: the section of the Code on ‘religion’ [i.e. Section Four of the Code] is only concerned with “religious programmes”, defined as programmes containing devotional material and other types of programming where religion or religious belief is either central or amounts to a significant part of the programme. This part of the Code is not concerned with comedies, drama or general entertainment programmes even though they may make reference to aspects of religion.

4F. DUE IMPARTIALITY, DUE ACCURACY AND UNDUE PROMINENCE OF VIEWS AND OPINIONS

101	Key Points
101	News Programmes
102	Due Impartiality in Non-News Programmes
103	Reporters & Presenters
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KEY POINTS

In News Programmes

- News, in whatever form, must be reported with due accuracy and presented with due impartiality. Presenting a story or item with “due impartiality” means presenting it in an appropriately balanced and fair way.
- Significant mistakes in news should normally be acknowledged and corrected on air quickly. Corrections should be appropriately scheduled.
- Politicians must not be used as newsreaders, interviewers or reporters in news programmes unless, exceptionally, it is editorially justified, in which case that person’s political allegiance must be made clear to viewers.

In Non-News Programmes

- **Programmes dealing with matters of political or industrial controversy or matters relating to current public policy must be duly impartial.** Whilst in most cases individual programmes should be duly impartial in themselves, impartiality can be achieved over a series of programmes taken as a whole. However, wherever impartiality is to be achieved over two or more programmes, this should be made clear to viewers e.g. by an on-air announcement immediately prior to each programme. In addition, views and facts must not be misrepresented and should be presented with due weight over appropriate timeframes.
- Any personal interest of a reporter or presenter, which would call into question the due impartiality of the programme, must be made clear to the audience.

- Presenters and reporters (or a chair in a discussion programme) can express their own views on matters of political or industrial controversy or matters relating to current public policy as long as alternative viewpoints are represented and due impartiality is achieved either within the programme itself or within a series of programmes taken as a whole.
- “Personal view” or “authored” programmes, which present a particular view or perspective must be clearly signalled to viewers as being so at the outset. Producers must seek advice from the programme lawyer at an early stage.
- Major matters. In addition to the above rules, in relation to major matters of political or industrial controversy and major matters relating to current public policy e.g. matters of national or international importance, a programme or clearly linked programmes must include and give due weight to an appropriately wide range of significant views and views and facts must not be misrepresented.

DUE IMPARTIALITY, DUE ACCURACY & UNDUE PROMINENCE OF VIEWS AND OPINIONS

[See Section 5 – Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions - at page 24 of the Code]

Note: Channel 4's news is produced by Independent Television News ("ITN") and Five's news is produced by Sky. All legal and compliance queries regarding Channel 4's and Five's news programmes should, in the first instance, be directed to the relevant personnel at ITN and Sky respectively.

Viewers have high expectations of television journalism, particularly in news programmes and factual programmes dealing with controversial matters e.g. politics and public policy issues. Audiences expect programmes to be accurate and to be appropriately balanced and fair.

To ensure this is achieved, Parliament has made it a statutory requirement that broadcasters ensure that news and matters of political or industrial controversy or matters relating to current public policy (in any type of programme), are reported with due accuracy and presented with due impartiality. In turn, these statutory provisions are reflected in the Code.

The Code contains a number of rules that apply specifically to news programmes and further rules that apply to all programming dealing with certain types of subject matter.

DUE IMPARTIALITY IN NEWS PROGRAMMES

DUE ACCURACY & DUE IMPARTIALITY

News, in whatever form, must be reported with due accuracy and presented with due

impartiality. In addition to traditional news programmes, "news" includes news bulletins, news flashes and daily news magazine programmes.

Clearly news programmes should be accurate i.e. factually correct. The requirement of "due" accuracy merely anticipates there may be details in relation to a story that it is acceptable to omit without adversely affecting the story's accuracy.

Presenting a story or item with "due impartiality" means presenting it in an appropriately balanced and fair way, in terms of including the various views, opinions and arguments that might exist in relation to a particular story and not favouring one side over another.

The term "due" is significant in that it means that impartiality should be adequate and appropriate in all the circumstances of the particular story. Broadcasters do not have to give equal time to each and every view or argument that might exist on a particular subject – just what is adequate and appropriate in all the circumstances.

CORRECTING MISTAKES

Significant mistakes in news should normally be acknowledged and corrected on air quickly. Corrections should be appropriately scheduled in order to reach a similar audience to the story which included the mistake. If producers become aware of a significant mistake having been broadcast because of a complaint or otherwise, they should immediately seek advice from the programme lawyer. No apology should be made without first having taken legal advice.

APPEARANCES BY POLITICIANS IN PROGRAMMES

Politicians must not be used as newsreaders, interviewers or reporters in news programmes unless, exceptionally, it is editorially justified, in which case that person's political allegiance must be made clear to viewers.

Any proposal to involve politicians in news programmes, other than as interviewees, must first be referred to the commissioning editor for approval who, in turn, should seek advice from the programme lawyer. Ofcom guidance states that the term 'politicians' includes an MP or councillor, a candidate, an applicant to be a candidate or a prospective candidate, an employee of a political party or an activist.

DUE IMPARTIALITY IN NON-NEWS PROGRAMMES

MATTERS OF POLITICAL OR INDUSTRIAL CONTROVERSY & MATTERS RELATING TO CURRENT PUBLIC POLICY

In non-news programmes, there is no general requirement of due impartiality unless the programme is dealing with "matters of political or industrial controversy" or "matters of current public policy". *The former are defined in the Code as being "... political or industrial issues on which politicians, industry and/or the media are in debate..."* e.g. the government's decision to go to war, the amount of tax charged on petrol, matters giving rise to industrial action/strikes and other similar matters. The latter i.e. matters of current public policy, are defined as being "... policies that are either under discussion or have been already decided by local, regional or national government or other organisations mandated to make such decisions ..." e.g. the introduction of

laws to deal with terrorism or extending licensing hours etc.. They need not be the subject of debate. It is worth noting that, in many cases, there will be an overlap i.e. many issues will be both matters of political or industrial controversy and at the same time matters of current public policy.

The following rules apply.

Due Impartiality

Programmes dealing with matters of political or industrial controversy or matters relating to current public policy must be duly impartial.

In most cases individual programmes should be duly impartial in themselves. However, impartiality can be achieved over a series of programmes taken as a whole i.e. where more than one programme deals with the same or similar subject e.g. a drama followed by a debate or a season of programmes.

Whenever impartiality is to be achieved over two or more programmes, this should be made clear to viewers e.g. by an on-air announcement immediately prior to each programme. Producers and editorial staff must seek early advice from the programme lawyer wherever it is intended to achieve impartiality in this way.

Note: this rule applies to both national and international matters e.g. foreign elections.

Misrepresentation & Due Weight

Views and facts must not be misrepresented and should be presented with due weight over appropriate timeframes. In each case, "due weight" will be a matter of judgment based on the particular circumstances.

REPORTERS & PRESENTERS

PERSONAL INTERESTS

Any personal interest of a reporter or presenter, which would call into question the due impartiality of the programme, must be made clear to the audience. For example, if a guest presenter or reporter had close connections to one political party and was reporting on a politically sensitive issue, then clearly it would be appropriate to alert viewers to the individual's political allegiances. Producers must ensure that all presenters and reporters are briefed about this requirement and that they have appropriate procedures in place to ensure that they become aware of any personal interests that could impinge upon the perceived impartiality of a programme or programme item. If in doubt, please seek advice from the programme lawyer.

VIEWS & OPINIONS

Presenters and reporters in non-news programmes (or a chair in a discussion programme) can express their own views on matters of political or industrial controversy or matters relating to current public policy as long as alternative viewpoints are represented and due impartiality is achieved either within the programme itself or within a series of programmes taken as a whole.

“PERSONAL VIEW” OR “AUTHORED” PROGRAMMES

Personal view or authored programmes which present a particular view or perspective must be clearly signalled to viewers as being so at the outset. Viewers' expectations are likely to be different if they know at the outset that what is being presented to them is acknowledged as being someone's personal view. However,

such programmes require careful handling and merely signalling a programme or programme item as being “personal view” may not be enough to discharge totally impartiality requirements. Producers must seek advice from the programme lawyer at an early stage.

UNDUE PROMINENCE OF VIEWS AND OPINIONS

Undue prominence must not be given to the views and opinions of individuals or bodies on matters of political or industrial controversy or on matters relating to current public policy, taking into consideration everything that is broadcast in relation to a particular issue, over an appropriate timeframe. This requires broadcasters and, in particular, commissioning editors and senior editorial executives to think carefully about how particular subjects are being dealt with generally by the channel with a view to ensuring, cumulatively, that output is duly impartial.

MAJOR MATTERS

In addition to the above rules, there is a further requirement that broadcasters ensure that due impartiality is preserved in relation to major matters of political or industrial controversy and major matters relating to current public policy. Such matters would include ones of national or international importance or of similar significance within a smaller broadcast area. When dealing with such major matters, a programme or clearly linked programmes must include and give due weight to an appropriately wide range of significant views. Views and facts must not be misrepresented.

PARLIAMENTARY FOOTAGE AND FOOTAGE FROM OTHER ASSEMBLIES

Although no longer a provision of the Code, there are rules which apply to the use within programmes of footage from within Parliament and certain other assemblies. In relation to Westminster and the House of Commons and House of Lords (including Committees in both Houses) these include the following:

- Footage must not be manipulated i.e. pictures or the sound altered in any way.
- Where two sections of a speech are included, it must be clear to viewers that an edit has been made and that the speech as presented is not continuous.
- Parliamentary footage may only be included in news and factual programmes and cannot be used in light entertainment (including political satire), fictional or drama programmes.

Similarly there are rules that apply in relation to footage from within the European Parliament, Scottish Parliament, Welsh Assembly and Northern Ireland Assembly. There are currently no restrictions regarding coverage of the London Assembly.

FAQs

Q. Is it only news programmes that have to be impartial?

A. No. Any programme concerning matters of political or industrial controversy or relating to current public policy must be duly impartial, either in themselves, or the broadcaster must seek to achieve impartiality in some other way e.g. by broadcasting another programme in which balancing views and opinions are expressed.

Q. On what subjects does a programme need to be impartial?

A. It is impossible to give an exhaustive list but matters of political and/or industrial controversy, or relating to current public policy would include the following: government domestic and foreign policy and all that entails e.g. the introduction of new laws, reforms etc, war, military action, defence, aid, sanctions, the economy, health, education, security, immigration, finance etc; party politics; industrial action, strikes, factory closures etc. If the subject matter can be broadly termed 'current affairs' and on which there exist opposing viewpoints, it is likely to be caught.

Q. What is a personal view programme?

A. A 'personal view programme' is just that: a programme in which the personal views or perspectives of an individual or group of individuals is propounded. Such programmes must be labelled as being a 'personal view' so viewers are clear about what they are watching. The Code acknowledges that personal view programmes can "... range from the outright expression of highly partial views, for example, by a person who is a member of a lobby group and is campaigning on the subject, to the considered "authored" opinion of a journalist, commentator or academic, with professional expertise or a specialism in an area which enables her or him to express opinions which are not necessarily mainstream". Simply labelling a programme as 'personal view' does not mean that broadcasters can dispense with ensuring impartiality, where it is required. Alternative viewpoints must still adequately be represented in the programme, or in a series of programmes taken as a whole.

Q. Why do we have to be balanced when the newspapers don't?

A. Television is much more closely regulated than the print media. Impartiality provisions are imposed on television output by an act of Parliament and compliance with those provisions is an important condition of all broadcasters' licences.

Q. Can't we achieve balance in some later programme?

A. Impartiality may be achieved by broadcasting one or more later programmes, which contain balancing arguments on a particular subject, so that, taken as a whole, the broadcaster's output is duly impartial regardless of views expressed on other channels or elsewhere in the media. This needs careful thought and planning. Wherever this is intended the commissioning editor and programme-makers should seek early advice from the programme lawyer.

4G. ELECTIONS

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KEY POINTS

- The reporting of elections and referendums must be duly impartial and facts must not be misrepresented.
- Due weight must be given to coverage of the major parties and any other parties or independent candidates with significant views or opinions during the election period.
- When the election period begins will depend on the exact nature of the election but invariably ends with the close of the poll.
- On polling day, discussion and analysis of election issues must finish when polling stations open.
- From the start of the election period, candidates in UK elections must not act as presenters or interviewers unless the programme is clearly non-political in nature and the appearance was arranged before the election period, in which case it may go ahead.
- From the start of the election period, if a candidate appears in a report about his/her constituency or electoral area, all other candidates should be offered the opportunity to take part. Constituency reports should also contain a list of all candidates standing in that constituency.
- After an election has been called, politicians must not be allowed to make constituency points in any type of programme where no other candidate will have a similar opportunity.

ELECTIONS

[See Section Six – Elections and Referendums - at page 30 of the Code]

Special rules apply to election reporting and to programmes broadcast in the run-up to elections. For detailed advice on this subject, please contact your allocated programme lawyer. There are separate Ofcom rules governing Party Political and Party Election Broadcasts. In addition, at the time of elections, separate guidance will be issued by Channel 4's and Five's legal and compliance departments.

Below is a brief summary of the rules.

WHICH ELECTIONS?

The rules apply to a General Election, European elections, by-elections, Scottish Parliamentary elections and elections for the Welsh, Northern Irish and London Assembly elections.

IMPARTIALITY

Elections and referendums fall within the definition of "Major Matters" (see 'Impartiality' at Chapter 4F) and, therefore, the Impartiality rules apply i.e. reporting must be duly impartial, programmes or clearly-linked programmes must include and give due weight to an appropriately wide range of significant views and views and facts must not be misrepresented.

DUE WEIGHT TO MAJOR PARTIES

Due weight must be given to coverage of the major parties during the election period. Broadcasters must also consider giving coverage during the election period to other parties and independent candidates with significant views and opinions. The major parties in the UK are the Labour Party, the Conservative Party and the Liberal Democrats, plus the Scottish National Party in Scotland and Plaid Cymru in Wales. In Northern Ireland,

the major parties are the Democratic Unionist Party, Sinn Fein, the Social Democratic and Labour Party and the Ulster Unionist Party. When the election period begins depends on the exact nature of the election but invariably ends with the close of the poll.

ON POLLING DAY

Discussion and analysis of election issues must finish when polling stations open. In addition, the results of any opinion poll (including exit polls) must not be published on polling day until the poll has closed. For European elections, results may not be published until all polls throughout the European Union have closed. References in news programmes to the fact that elections are taking place can be made but they should not include any discussion or analysis of policies or issues relevant to the election.

APPEARANCES BY CANDIDATES

From the start of the election period, candidates in UK elections must not act as presenters or interviewers unless the programme is clearly non-political in nature and the appearance was arranged before the election period, in which case it may go ahead.

CONSTITUENCY REPORTS

In reports during an election about particular constituencies or constituency matters, special rules exist to ensure that candidates are not given any unfair advantage over other candidates. In particular:

- If a candidate appears in an item about his/her constituency or electoral area, each candidate standing for the major parties and other candidates with previous or current support should be offered the opportunity to take part.

- If a particular candidate refuses or is unable to take part, the report may still go ahead. It would normally be stated that such candidates were invited to take part but either refused or were unavailable.
- Constituency reports should contain a list of all the candidates standing giving their first and last names and the party they represent, in sound and/or vision.
- Where politicians are appearing in programmes for whatever reason after an election has been called, he/she must not be given the opportunity to make constituency points when no other candidates will have a similar opportunity.

FAQs

Q. What is the Election Period?

A. This is the period during which the special due impartiality rules [Section 6 of the Code] governing election and referendum reporting apply. In the case of a General Election, the period commences with the announcement of the dissolution of parliament and ends with the close of the poll on polling day.

Q. What is a constituency/electoral area report or discussion?

A. This is where an electoral candidate takes part in a report or discussion about his/her particular constituency or electoral area.

Q. Do all candidates within that constituency/electoral area have to agree to take part in the report or discussion?

A. No, but candidates from each of the major political parties and from other parties who have previous or current significant electoral support must be invited to take part. If they refuse or are unable to take part, the report or discussion can still go ahead, provided a list of all the candidates standing in that constituency or electoral area – full name of the candidate and party - is conveyed in sound and/or vision at the end of the report or discussion.

Q. Can a candidate take part in a non-political programme during the election period?

A. Appearances by candidates in non-political programmes planned or scheduled before the election period can continue but new appearances should not be arranged and broadcast during this period.

Q. Do special rules apply to Party Election and Party Political Broadcasts?

A. Yes. Party Election and Party Political Broadcasts are covered under separate rules - the Ofcom '*Rules on Party Political and Referendum Broadcasts*'. These rules cover the allocation, duration and scheduling of such broadcasts. Whilst editorial control of such broadcasts rests with the political parties, broadcasters remain responsible for ensuring they comply with the Code. The political parties are also required to comply with the '*Guidelines for the Production of Party Election Broadcasts*', drawn up by the broadcasters and designed to assist the parties in complying with the Code.

4H. EDITORIAL INDEPENDENCE AND COMMERCIAL REFERENCES WITHIN PROGRAMMES

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KEY POINTS

- Programme content and advertising must be kept entirely separate.
- Products and services must not be promoted within programmes. Programme-related material is excluded from this rule.
- The broadcaster must retain complete editorial control over programme content.
- Programmes must not give undue prominence to commercial products and services. Product placement is generally prohibited.
- Programme-related material e.g. factsheets, websites, helplines, premium rate telephone numbers, etc. may be promoted within programmes or around the programmes to which they relate as long as it is editorially justified to do so and the broadcaster retains responsibility for the material.
- Premium rate telephone numbers should not be included in programmes unless their inclusion is editorially justified and not promoted within programmes unless they fall within the definition of programme-related material.
- All competitions within programmes should be referred in advance to the programme lawyer for detailed advice on all matters involved, including premium rate telephone, text and red button interaction and the provisions of the Gambling Act 2005.
- Generally advertisements must be clearly separated from programmes. However, all types of programming may contain advertisements or clips from advertisements, if editorially justified. Seek advice from the programme lawyer.
- Charitable appeals within programmes are permissible. However, there are specific rules that broadcasters and programme-makers must follow.
- Television broadcasters are never allowed to broadcast appeals for donations to make programmes or fund their service.
- There are complex rules in relation to broadcasting financial promotions. Seek advice from the programme lawyer.
- News and current affairs programming may not be sponsored.
- Generally, programmes cannot be sponsored by organisations that are prohibited from advertising on television, e.g. the tobacco industry.
- Sponsored programmes must not contain any promotional references to the sponsor, its activities or products or services. Non-promotional references are permitted only where they are editorially justified and incidental.

EDITORIAL INDEPENDENCE AND COMMERCIAL REFERENCES WITHIN PROGRAMMES

[See Sections Nine and Ten of the Code: 'Sponsorship' at page 49 and 'Commercial References and Other Matters' at page 53 of the Code]

GENERAL PRINCIPLES

As commercial broadcasters, Channel 4 and Five are funded primarily through advertising. However, other than as a general means of generating revenue with which to fund our programme-making and broadcasting activities, advertisers and commercial organisations should not in any way encroach upon our editorial independence and integrity. The following rules apply.

Programme content and advertising must be kept entirely separate – for further rules relating to the separation of advertising and programming, see the 'Rules on the Amount and Distribution of Advertising' at www.ofcom.org.uk.

Products and services must not be promoted within programmes – programme-related material is excluded. See "Undue Prominence" and "Product Placement" below.

Broadcasters must retain complete editorial control over their programme content. In order to achieve this:

- programmes must always be and appear to be editorially independent;
- programmes should not promote or endorse the commercial products and services of others or appear to (see undue prominence and product placement below);

- any improper external influence on the editorial process must always be resisted e.g. by a commercial organisation, a contributor or anyone or any organisation who seeks to exercise some degree of control over programme content;

- the external activities of personnel working for us e.g. producers, presenters, must never improperly influence the editorial integrity of our programmes;

- on-air credits should always be justified.

PRODUCTS AND SERVICES WITHIN PROGRAMMES

In today's society, commercial brands, products and services are everywhere. Inevitably, therefore, this will be reflected within programmes and whilst there is no absolute prohibition on including verbal and visual references to commercial products and services within programmes, in order to maintain the editorial integrity of programming, the following rules apply.

UNDUE PROMINENCE

Programmes must not give undue prominence to commercial products and services.

Clearly, commercial products and services can be referred to in programmes i.e. both visually and orally, but their inclusion and manner of inclusion should always be editorially justified.

The frequency and manner in which a product or service appears or is referred to in a particular programme will have a direct bearing on whether or not it is being given undue prominence.

A useful practical yardstick is that no impression be created of external

commercial influence on the editorial process i.e. if viewers are left feeling a deal has been struck between the producers of a programme and an advertiser to promote a product or service by stealth or otherwise, this is very likely to amount to undue prominence of the product or service in question, regardless of whether or not such an arrangement exists (see also Product Placement below).

Generally, studio-sets should not contain 'permanent' items that are branded e.g. branded items of furniture or props.

In studio-based programmes, branded products may be brought onto the set if editorially justified for a particular programme item e.g. a consumer item but, even then, verbal and visual references to the item should be kept to what is strictly editorially justified. For example, it will not normally be necessary to name-check repeatedly products under discussion and, if branded items are brought into the studio, thought should be given as to how they are shown on camera. They should not be placed in such a way that they are unduly prominent e.g. placed directly in front of the camera and left there for an unduly long time (which may be measured in mere seconds).

Including a range of products or services of the same type is likely to reduce the impression of any commercial influence on the editorial process and, in turn, to reduce the risk of giving any one product or service undue prominence. For example, in a consumer item about DVD players, if every DVD player featured was of the same make, viewers may well suspect commercial influence on the editorial process and the brand is likely to be given undue prominence. Including a range of brands e.g. JVC, Sony, Panasonic ... is likely to reduce that impression.

Guests who are being interviewed in studio-based programmes and contributors in factual programmes should, wherever possible, be told in advance of filming not to wear prominently branded clothing. This is especially important if the guest or contributor has some commercial relationship with the brand in question e.g. a footballer, who is sponsored by Nike, should not be shown wearing prominently branded Nike sportswear in a studio based item.

Viewers are likely to have different expectations depending on the situation in which contributors are filmed. For example, athletes being interviewed trackside are likely to be wearing clothing heavily branded with the marks of their sponsors and viewers will realise that programme-makers have little or no control over this.

In film and drama where, in most cases, programme-makers have a greater degree of control over what is shown on camera, there must be strong editorial justification for deliberately including any identifiably branded products and, even then, their prominence should be strictly limited to what is necessary editorially.

In documentary and factual programme-making, producers are unlikely to have much, if any, control over the surroundings in which they are filming. However, programme-makers should always be aware of branded items around them and 'pieces to camera' and interviews should not be conducted against a backdrop with prominent commercial logos or names on it unless, exceptionally, it is editorially justified to do so e.g. the interview is part of a news report about the brand in question. If in doubt, seek advice from the programme lawyer.

PRODUCT PLACEMENT

Agreements between programme-makers or broadcasters and external companies or agencies to include or to refer to commercial products or services within programme time in return for payment or something else of value e.g. free or discounted goods, are termed “product placement” and are generally prohibited.

Editorial Justification Exception

There is an exception to the general prohibition. Where their use within a programme is editorially justified, products or services may be acquired free or at less than full cost, providing this is not conditional on any specific agreement as to the manner of their appearance in the programme. In such cases, where the identity of the product is not otherwise apparent e.g. where a camera is shown but the make, e.g. “Fuji, is not seen or mentioned verbally, a brief text acknowledgement (on-screen for no more than approximately five seconds, with no logos or special fonts) to the provider of the product or service in the end credits may be given e.g. “With thanks to X”. Note: the product may or may not give any indication of its provider e.g. a Fuji camera may be supplied by Fuji itself or a high street retailer e.g. Currys. If “Fuji” was seen on the camera in the programme or it was referred to verbally, it would not be permissible to credit Currys in the end credits.

Example

What is “editorially justified” will depend on the particular circumstances and the nature of the programme. For example, whilst it would be likely to be acceptable to receive free or discounted flights in a travel programme, as this would have a direct editorial connection to the subject of the programme, it would not be permissible to accept free or discounted designer clothes for the presenter in return either for an

incidental product mention within the programme or an acknowledgement in the end credits. In such a case, there would be no editorial justification.

In the first example (free flights), no specific agreement could be made with the airline about whether or not the name of the airline would in fact be featured or how it might be featured but it may well be that, editorially, the programme-makers would want to make such a reference, in which case that would be acceptable. If, as it turned out, the name or identity of the airline was not apparent from watching the programme, a credit to the provider could be given in the end credits, as above.

Since often it may not be clear whether or not such editorial justification exists, producers must always seek advice from the programme lawyer before accepting such products or services for free or at less than their full cost.

Purchased Programmes

In other countries, product placement or deals similar to product placement are permissible. Ofcom rules state that if UK licensed broadcasters purchase programmes that contain products or services which have been the subject of a product placement type agreement, they can be shown but only as long as the UK licensed broadcaster does not directly benefit from the arrangement e.g. financially. The same principle applies to films that are originally made only for cinema release and contain product placement. However, broadcasters must still ensure that such programmes and films do not contain undue prominence of commercial products or services, regardless of whether or not the inclusion of the product/service in question is the result of product placement. Editing may still be required.

PROGRAMME-RELATED MATERIAL

“Programme-related material” is defined as products or services that are directly derived from a specific programme and are intended to allow viewers to benefit fully from, or to interact with that programme. Programme-related material may include a book or DVD of a series; a live event directly derived from a programme; downloads of outtakes from a programme; a telephone service providing further information about issues discussed in a programme; the programme itself if available on another channel; a factsheet or website containing relevant information about the programme, premium rate telephone numbers, or SMS text services. The following rules apply:

- All such material can be promoted within programmes or around the programmes to which they relate i.e. within presentation time, as long as it is editorially justified to do so and we, as the broadcaster, retain responsibility for the material. Generally this means that we, as the broadcaster, should be in a position to exercise editorial control over the content of the programme-related material.

- To avoid giving undue prominence to programme-related material, any references to such material within programmes or in presentation time should be kept brief and confined to the name of the item, its cost and availability. In most cases, there will be no editorial justification in naming specific retailers where the material can be obtained from.

PREMIUM RATE SERVICES

At the time of publication Ofcom is consulting on proposals to amend the Code’s rules for programmes involving

participation by viewers or listeners via premium rate services. Any updates to the Code will be published on Ofcom’s website and updated to the Handbook will be published on the Handbook website.

Premium rate telephone numbers and other services should not be included in programmes unless their inclusion is editorially justified and should not be promoted within programmes unless they fall within the definition of “programme-related material” (see above), in which case:

- full control, including editorial control, of any premium line messages must be retained;
- the arrangements must comply with the PhonepayPlus (formerly ICSTIS) Code of Practice;
- the service must only convey information which is directly relevant to the programme with which it is associated and which is of benefit to viewers;
- the service must not promote any product or service, except programme-related materials; and,
- detailed rules on the provision of on-screen call charge information apply.

You must read and follow the ‘Use of Telephony Services’ Checklist, Chapter 6G.

COMPETITIONS

Viewer competitions and game shows are an established part of many types of programming and will often have brand names or commercial organisations associated with them, either in connection with the prize itself or the prize donor, or both.

To ensure that brands and commercial organisations associated with competitions do not receive undue prominence, the Code states: “References to brands within competitions must be brief and secondary”.

In practice, the following rules should be followed in order to achieve this:

- As a general rule, any one viewer competition or game show should have no more than two pairs of verbal and visual commercial references associated with it, per programme part. Advice should be sought from the programme lawyer on the cumulative effect of such references occurring in more than one part if that is intended.
- References may be verbal and/or visual e.g. *"To win a Nokia phone ..."* - the presenter or voiceover could say "Nokia" and also show the phone, with Nokia written on it. That would be one reference (i.e. one pair). Additionally, the brand or logo of the prize donor may be referred to e.g. *"To win a Nokia phone courtesy of Vodafone ..."* - here "Nokia" could be mentioned verbally and the phone (containing the word Nokia) shown (1 mention); and, Vodafone could also be named as the donor verbally and a caption with the name "Vodafone" shown (a further 1 mention). So, a total of 2 pairs of references i.e. the maximum allowed within one programme part.
- References should be kept factual and non-promotional e.g. *"To win a first class trip to New York, courtesy of British Airways, answer the following ..."* rather than: *"To win a first class trip to New York courtesy of the world's favourite airline, British Airways, answer the following ..."*. References to commercial products/ services or organisations in connection with competitions should not sound like advertisements.
- Visual references should be brief and not unduly prominent. As a general rule, a caption containing a brand name or logo should never occupy more than approximately 10% of the screen and should be on screen for no longer than

5-10 seconds.

- There may be a number of competitions within a single programme e.g. shows in the past have featured a different viewer competition around each and every ad break i.e. question before the break with the answer and the winner announced after it. However, where programmes contain more than one competition, prizes and prize donors should be different for each competition, to reduce the risk of giving undue prominence to particular commercial brands. Advice should be sought from the programme lawyer on whether the cumulative effect of all the competitions taken together is problematic.

Examples

- *"To win a holiday to Disneyland Paris (1 verbal reference) courtesy of e:bookers..." (1 verbal reference), answer the following question ...* Here there are two commercial references, both verbal.
- *"To win a year's supply of Perrier (accompanied by a picture of bottles of Perrier with the logo and name shown) (1 pair, verbal and visual) courtesy of Nestle, (accompanied with caption showing company logo), (1 pair of verbal and visual) - total 2 references, which is acceptable.*

Note: if the method of entering a viewer competition generates revenue and involves a premium above the normal rate for that mode of communication e.g. in the case of entry by telephone, the call costs more than what the user pays for any call to any other non-commercial user, the competition must either involve a significant element of skill e.g. the viewer must answer a question at a level of skill sufficiently rigorous to meet legal requirements (on which advice should be sought from the programme lawyer) or the competition must have free means of entry e.g. by post and/or via a website, and those free means of entry must be

promoted with due prominence when compared to the premium rate paying routes in terms of size, frequency and duration, otherwise the competition may be classed as an "illegal lottery". This would be a criminal offence.

Legal advice must be sought at an early stage to ensure competitions comply with the provisions of the Gambling Act 2005, which came into effect on 1 September 2007. Finally, note that in children's competitions, prizes must be appropriate to the age range of both the target audience and the participants. For example, young children should not be competing for large cash prizes.

All competitions within programmes must be referred in advance to the programme lawyer for advice on the above matters.

ADVERTISEMENTS WITHIN PROGRAMMES

Generally advertisements must be clearly separated from programmes. However, all types of programming including news, current affairs, factual and entertainment programmes, may contain advertisements or clips from advertisements, if there is sufficient editorial justification.

For example, it may be editorially justified to show a clip of an advertisement for a brand in a news or factual programme, perhaps as part of a report about the commercial fortunes of the brand in question, particularly if the ad campaign referred to is particularly relevant.

Only as much of the advertisement should be shown as is justified by the editorial requirements of the programme. In most cases it is likely to be appropriate to remove the 'pack shot' i.e. the shot normally at the end of an advertisement where the product or brand is named and shown for a number of seconds.

If the producer intends to include an advertisement or any part of one within a programme, particularly if it is current and is being transmitted within paid-for advertising time, advice must be sought from the programme lawyer at an early stage.

APPEALS FOR CHARITY

Broadcasters are able to make appeals for charities within programmes, as long as they do not charge the charities to do so and provided that the broadcaster has satisfied itself that:

- the charity can produce satisfactory evidence of charitable status;
- in the case of an emergency appeal, that a responsible public fund has been set up to deal with donations; and
- the organisation concerned is not prohibited from advertising on television.

In addition, there is a general requirement that, where possible, appeals, either individually or over time should benefit a wide range of charities i.e. repeated appeals for one or a small number of the same charities would be unacceptable.

FUNDS FOR PROGRAMMES

Television broadcasters are never allowed to broadcast appeals for donations to make programmes or to fund their services.

FINANCIAL PROMOTIONS

There are complex rules in relation to broadcasting financial promotions i.e. an invitation or inducement to engage in investment activity and investment recommendations, in relation to a specific investment decision e.g. to buy or sell particular shares.

For further information on this complex area, please refer to the programme lawyer. Such financial promotions must never be broadcast without having sought and acted upon the advice of the programme lawyer.

VIRTUAL ADVERTISING

Any intention to employ ‘virtual advertising’ i.e. altering pictures to replace existing advertising at an event with other advertising e.g. for geographical reasons, must comply with Section 10.18 of the Code. In addition, please refer to the programme lawyer for further advice.

SPONSORSHIP

[See Section Nine of the Code – page 49]

A sponsored programme (which includes advertiser supplied programmes) is one which has had some or all of its costs met by a ‘sponsor’ with a view to promoting itself or its products or services, or those of another. A sponsor may be any public or private undertaking, including charities (but see below for prohibited and restricted sponsors).

Sponsorship deals are now commonplace and are a legitimate way for commercial broadcasters to increase revenue for their programme-making activities. However, to ensure that programmes remain editorially independent and that sponsors do not encroach upon the editorial integrity of the programmes they are sponsoring, the following rules apply.

CONTENT WHICH CANNOT BE SPONSORED

Only news and current affairs programming may not be sponsored. The Code defines “current affairs programming” as programming which “... contains

explanation and analysis of current events and issues, including material dealing with political or industrial controversy or with current public policy”.

PROHIBITED AND RESTRICTED SPONSORS

Programmes cannot be sponsored at all by organisations that are prohibited from advertising on television e.g. the tobacco and pornography industries. For further details see the TV Advertising Standards Code at www.asa.org.uk.

EDITORIAL INDEPENDENCE

Broadcasters must retain editorial control of all their programmes including sponsored programmes.

PROMOTIONAL REFERENCES TO SPONSOR PROHIBITED

Sponsored programmes must not contain any promotional references (i.e. references which would encourage or are intended to encourage the purchase or rental of a product or service) to the sponsor, its activities or products or services, including generic references to a type of product or service. In addition, the sponsor must also not have any other direct or indirect interest in the editorial content of the sponsored programme. References that are non-promotional are permitted but only where they are editorially justified and incidental.

Programme-makers and editorial staff at the broadcaster should always ascertain whether the programme they are making is to be sponsored. No references to the sponsor or its products or services should be made within any sponsored programme without first seeking advice from the programme lawyer.

SPONSORSHIP CREDITS

Sponsored programmes must be

identified as such either at the beginning or end of the programme. This can be done visually, verbally or both. The relationship between the sponsor and the sponsored programme must be transparent. Sponsorship credits and/or integrated title sequences must be clearly separated from programmes and from advertising. Sponsorship credits must not contain advertising messages or calls to action. In particular, credits must not encourage the purchase or rental of the products or services of the sponsor or a third party. If a trail for a programme contains a reference to the sponsor, it must remain brief and secondary.

COVERAGE OF A SPONSORED EVENT

If a programme is covering a sponsored event e.g. the Orange British Film Academy Awards, The Brit Awards with Mastercard, Shockwaves NME Awards, or a sporting occasion e.g. the Artois Championships (tennis), the Carling Cup (football), there must be no undue prominence given to the event sponsor, its products or services (see ‘Undue Prominence’ above). The appearance of any logos must arise naturally and incidentally from coverage of the event itself, e.g. participants’ branded clothing, hoardings, advertising, banners. Any other editorial content associated with the event but which occurs away from the event should not generally include visual or verbal references to the event sponsor. Furthermore, the programme’s presenters should never wear any clothing which is branded with the event sponsor’s name or logo.

Any plans to include the event sponsor’s name or logo in the programme’s titles sequences, break bumpers, or in captions/astons should be referred to the programme lawyer for advice. All references must be editorially justified and regard must be had to the cumulative effect

when all references are taken together.

Where the event sponsor is also the programme sponsor (i.e. the event sponsor has also contributed to the programme’s production costs with a view to promoting itself) e.g. Swarovski’s Fashion Rocks, the following additional rules also apply:

- Any reference (actual or generic) to the programme sponsor or the programme sponsor’s products or services must be incidental, non-promotional and there must be editorial justification for its inclusion. This does not preclude incidental shots of the sponsor’s on-location branding that occur as a result of filming the event, but there should be no branding, or references to the programme’s sponsor, outside of coverage of the actual event itself without editorial justification. A reference to the sponsor within a programme may create a higher presumption of editorial influence by the sponsor.

- The programme/event sponsor’s name may appear in the title of the programme and in title sequences, break bumpers and in caption/astons. However, advice should be sought in advance from the programme lawyer to avoid giving the brand in question undue prominence.

- Reference to the sponsor within a programme must not be a condition of the sponsorship arrangement, otherwise this would amount to product placement, which is prohibited (see ‘Product Placement’ above).

- The sponsor cannot ‘place’ their branding within programmes they are funding. Programme-makers/broadcasters must keep sole control of the way in which the event is filmed and the way in which references to the sponsor are included in the broadcast programme.

To avoid problems and having to edit or pixelate footage, programme-makers should seek early advice from the programme lawyer on what will be and what will not be acceptable.

Note: a sponsored event cannot be 'created' for television and covered in the way described above. The event must exist independently of the television coverage i.e. it would happen regardless of whether the event was to be televised. For example, it could be argued that the Big Brother finale is 'an event' in itself. However, whilst the Big Brother series could be sponsored in the normal way (with sponsorship titles, credits and part bumpers), the 'event' that is the final programme could not i.e. a sponsor would not be able to have its name or branding on set in and around the Big Brother studio. This rule is to prevent advertisers simply creating events solely in order to get their name and branding within programme time. If in doubt, seek advice from the programme lawyer.

FAQs

Q. What's the difference between undue prominence and product placement?

A. "Undue prominence" occurs when there is insufficient editorial justification for the degree of prominence (verbal and/or visual) given to a commercial name, logo, product or service in a programme e.g. viewers get the impression that a programme is plugging a particular commercial product or service. "Product placement" is an even more serious breach, which occurs when a producer or broadcaster receives a payment or benefit (in cash or in kind) to include a verbal and/or visual reference(s) to a commercial name, logo, product or service in a programme.

Q. How can I stop guests wearing branded clothing, particularly celebrities?

A. This can be a sensitive matter, which needs to be raised diplomatically but clearly at an early stage. Programme-makers should explain the broadcaster's obligation under the Code to avoid undue prominence. If all else fails, creative shooting and editing, with close-ups on the face, framing logos out of shot, pixelation and even editing material out may be required.

Q. A company is willing to supply the programme with 'freebies'. Can they be given a programme credit?

A. This depends on the nature of the programme and what the items are. If they are unusual and expensive objects or services which are editorially important to the programme, then a simple "*with thanks to*" credit at the end of the programme is likely to be permissible or, alternatively, identification of the items or the company providing them within the programme may be allowed, if editorially justified and not too prominent. However, both cannot be given. It is also usually permissible to give a "with thanks to" end credit to, for example, tourist boards or public bodies who have assisted with filming.

Q. Can advertisements be included in programmes?

A. Yes, providing it is clearly understood to be an advertisement or extract from an advertisement, its inclusion is editorially justified in the particular context and undue prominence to the product or service is avoided.

Q. What is a sponsored programme and why does it matter?

A. A programme is considered to be sponsored if a third party has contributed towards the cost of making or broadcasting the programme. That can either be by paying the broadcaster or producer a significant sum of money for the privilege of elaborate sponsor credits before and after the programme (and in and out of the ad breaks as well); or it can arise from an informal contribution to the programme producer's budget (this should be discussed first with the department at the broadcaster which deals with sponsorship). In both cases, there is an obligation for that sponsorship to be made clear to viewers and there must be no promotional reference (verbal or visual) to the sponsor in the programme. Sponsors may be credited as prize donors or have their products/services as prizes in viewer competitions in programmes they are sponsoring, but

particular care needs to be taken to ensure that the degree of prominence is justified. Advice should be sought at an early stage.

Q. Is it permissible to mention that the presenter of a programme has a book published which is “available in all good bookshops”?

A. It depends on the connection between the programme and the book, and what role the broadcaster has had in its production. Programme-related material (books, magazines, DVD’s, web sites etc.) can be promoted on air if it is “*directly derived from a specific programme*” and the broadcaster has “*responsibility*” for the programme-related material. However, if the book in question did not fall within the definition of programme-related material e.g. the book was an autobiography of the presenter, published independently of the broadcaster, it could not be promoted within or around the programme. This can be a tricky area and advice should be sought from the programme lawyer.

Q. A car manufacturer has offered us a top of the range car as a prize for a viewer competition. Is this permissible?

A. Commercial products and/or services can be given away as prizes in viewer competitions in programmes and in presentation time, providing the commercial references (verbal and visual) are “*brief and secondary*”. Programmes should not promote the product or service and should describe it without giving it undue prominence. As a guide, two combined verbal and visual references to the commercial names per programme part is permissible. Advice should be sought from the programme lawyer on the cumulative effect of such references occurring in more than one part.

Q. Can broadcasters promote their other commercial channels, video on demand, mobile services and websites?

A. Yes. Ofcom rules on cross-promotion clarify that broadcasters can do so within presentation time (but not within programmes), providing the service is “*broadcasting-related*” i.e. that the service delivers content similar to that delivered on a television or radio service. Some material e.g. websites or references to a programme showing on another channel, may be both broadcasting-related as well as programme-related.

Possible examples include a television channel; a radio station; video-on-demand; content delivered over a mobile or broadband platform; a website that provides content clearly and directly related to a broadcasting-related service e.g. a channel’s own website.

When promoting the service, in which the broadcaster must usually have at least a 30% interest, broadcasters can also refer to the commercial names of the platform the service is carried on, providing the promotion mentions all of the platforms the service is on and does so equally. Note: there are exceptions for platforms with less than 500,000 customers. Seek advice from the programme lawyer.

5 MEDIA LAW

5A. DEFAMATION

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KEY POINTS

- What is defamatory? A statement is defamatory if, when said about a person or organisation and published to a third party, it would make people think less of that person/organisation.
- Who can sue? Any living individual can sue for defamation; the dead cannot. Companies can sue if the defamatory statement is in connection with its business or trading reputation and individual directors may be able to sue too.
- A class of individuals, if sufficiently defined and identifiable, can also sue, although the larger the class of individuals defamed, the less likely unnamed individuals would be able to take legal action.
- Fictional programmes can be defamatory if reasonable viewers would understand references within them to be referring to real individuals/organisations.
- Accidental defamation. It is possible to libel a person or a company accidentally. For example, the juxtaposition of someone's picture with spoken words or commentary may accidentally libel that person. Intention is irrelevant.
- Although other defences exist, the main defence to a libel action is being able to prove that the defamatory allegation is true.
- In live programmes, it is vitally important that presenters take swift and effective action to distance the programme and the broadcaster from any potentially libellous remark, which must not be repeated.
- Who can be sued? Any person who causes or is responsible for the publication or broadcast of a defamatory statement can be sued. In libel actions, the burden of proving the truth of the allegations is on the party that makes the allegations i.e. the programme-makers and/or broadcaster. What is important, therefore, is not just that the story is true but that the story can be proved to be true.
- Opportunity to Respond. Wherever potentially defamatory allegations are made, it will usually be necessary for a response to be sought from the subject of the allegations on what is being alleged and fairly reflected in the programme, both for legal reasons and to comply with the Code.
- Involvement in a libel action is both costly and time consuming, as well as stressful. However, Channel 4 and Five will robustly defend its programmes and their makers where appropriate and where it is believed there is a good defence to the libel claim.

DEFINITION

Defamation law exists to protect the reputation of a person from defamatory statements made about him/her to a third party without lawful justification. A statement is defamatory if, when said about a person and published to a third party, it would make ordinary people think less of that person.

For a person to sue they must show that the defamatory language was a) used about them, b) that they were identified or identifiable and c) that the words were published to another, i.e. a third party. It doesn't matter whether the statement is intended to be defamatory; ultimately a jury (or sometimes a judge) will decide what the broadcast is saying about the individual and whether it has unjustifiably injured their reputation.

See 'What is Defamatory?' below.

WHO CAN SUE?**Individuals**

Any living individual can sue for defamation; the dead cannot i.e. an estate or relatives of a deceased person cannot sue for libel over defamatory statements made about the deceased person.

Companies

Companies can sue if the defamatory statement is in connection with its business or trading reputation.

Residents overseas

Foreigners can and do sue in the UK, even when they are not allowed to enter the country e.g. Roman Polanski, who lives in Paris successfully sued Vanity Fair, a US publication, in England because the magazine had a limited circulation there. In fact, London is often referred to as the "libel capital of the world", as it is one of the easiest places in which to sue for libel.

A Group of Individuals

A group or class of individuals, if sufficiently defined, can also sue e.g. it would be defamatory to say that all strikers of a particular football team took performance enhancing drugs and each one could potentially sue, even though none had been named specifically. The larger the class of individuals defamed, the less likely unnamed individuals would be able to sue.

Taking the above example, unnamed individual players could not sue on the generalised allegation that players in the Premier League took performance enhancing drugs. Similarly, individual unnamed goal keepers would not be able to sue on the generalised allegation that all professional goal keepers take 'bunges', because the class is too large.

Government bodies, which include for example local authorities, the police, state schools and NHS hospitals cannot bring libel claims. If, however, individual members, officers or employees are the subject of the defamatory statements these individuals can sue.

'Jigsaw Identification'

Sometimes television programmes/newspapers report defamatory allegations but, for one reason or another e.g. they are not confident they can actually prove the allegations, they do not identify the individual or organisation they are referring to, only giving certain details which they hope will be insufficient for viewers/readers to work out who is being referred to.

This is risky not least because, following publication, third parties e.g. other media organisations or even just individuals on the internet, may identify the individual or organisation to which the programme/newspaper was referring. Thus the allegations have been made and the person has been identified. When this

happens, the question of where liability for defamation lies is not clear and it is likely that the person or organisation who considers themselves defamed would attempt to sue the original programme or newspaper that originally made the allegations, as other potential defendants i.e. those that actually identified the subject of the allegations, may be difficult to track down or have little money e.g. website publications.

FICTIONAL PROGRAMMES

Fictional programmes can be defamatory if viewers understand references within them to be referring to real people (or organisations), even if the real person's name is not used and even if the programme is not intending to refer to a real person. For example, a fictional sitcom set in the House of Commons could potentially defame a real government minister if viewers were to identify a real person with the fictional character. The fact that the script writers had not intended for there to be such a connection would be irrelevant.

Where there is a risk that viewers may identify real people with fictional characters in drama, programmes normally carry a disclaimer informing viewers that the drama and all characters are entirely fictional. See Fictional and Fact-Based Drama Checklist at Chapter 6.

WHO CAN BE SUED?

Any person who causes or is responsible for the publication or broadcast of a defamatory statement can be sued e.g. writer, producer, director, editor, interviewee, broadcaster, even, in the case of a book, the printers or the newsagents or booksellers.

There is a common misconception that because a libellous remark is made by a contributor or interviewee in a programme and not in commentary, the film-makers/

broadcaster cannot be held legally responsible. This is incorrect. The broadcaster and film-makers are liable as contributing to the publication of the libel.

INTENTIONAL/ ACCIDENTAL DEFAMATION

Current affairs programmes and films will often intentionally broadcast defamatory allegations about individuals and/or companies. This will only occur after a thorough investigation by the programme-makers and a detailed examination of the evidence by the broadcaster and its editorial and legal advisors. However, it is possible to libel a person or a company accidentally. The juxtaposition of someone's picture next to a piece of sync or commentary may accidentally libel that person. For example, showing an entirely innocent member of the public walking through Customs, juxtaposed with a piece of commentary or sync about the illegal importation of drugs may well give the false impression that the person shown is a drug smuggler. This would amount to a libel of that person. Great care must be taken to avoid such accidental libels.

A common cause of claims for libel is the incorrect use of photographs in connection with particular stories e.g. individuals whose photographs have mistakenly been used in news programmes, in connection with terrorist offences, have sued and received substantial damages. It is, therefore, vital that producers take great care to ensure that the right photographs illustrate a story and that identified individuals are indeed involved with the story under discussion.

THE DEFENCES**Justification or truth**

The main defence to a libel action is 'justification' i.e. being able to prove that the defamatory allegation is true.

Fair comment

Another defence is 'fair comment', which protects honest and sincere opinion, based on true facts, on matters of public interest. This defence, however, is not as 'easy' as it sounds and can be defeated if it can be shown that the person being sued was 'malicious' i.e. was reckless with regard to the truth e.g. the filmmaker didn't make proper journalistic enquiries.

Other defences

There are other defences to libel such as absolute and qualified privilege, which attach to the reporting of certain proceedings e.g. the fair and accurate reporting of UK court proceedings or proceedings in the UK parliament. 'Qualified privilege' is so called because it too is defeated by malice. If a person consents to being libelled, this is also a defence. Broadcasters may also be able to avail themselves of a specific defence relating to live broadcasts if a libel occurs unexpectedly.

'Reynolds Privilege'

In recent years, the courts have also developed a defence commonly referred to as "Reynolds privilege", which protects responsible journalism on matters of important public interest. However, programme-makers should note that this defence is not as straightforward as it may first appear and detailed legal advice should always be sought wherever it is intended to rely upon it. See 'Opportunity to Respond' below.

LIVE PROGRAMMES

If a guest on a live programme makes an unprompted defamatory remark, the production company/broadcaster may be able to avoid legal liability if they can satisfy the following test:

- demonstrate that the statement was made in circumstances where they had no effective control over the person making the defamatory remark; and

- demonstrate they took "reasonable care" in relation to the production and they did not know or had no reason to believe that they were contributing to the publication of the defamatory remark.

This is a complete defence regardless of the truth of the statement. In order to rely on this defence, it is important that presenters take immediate and effective action to distance the programme and the broadcaster from the offending remark, which must not be repeated. See broadcasters' 'Live Programme Procedures' at Chapters 2 and 3.

Note: if a defamatory remark was made by a presenter in a live situation, it is unlikely this defence could be relied upon, for the simple reason that the presenter would be likely to be deemed to come under the effective control of the production company/broadcaster.

WHO HAS TO PROVE WHAT?

In libel actions, the burden of proving the truth of the allegations is on the party that makes the allegations. The fact that a story is true is not, therefore, enough. Can the story be proved to be true?

PROOF

Success in any libel action depends on having the evidence to prove the allegations that have been made. Evidence can take many forms but the rules of evidence are complicated. What may seem to be strong cogent evidence of a particular fact may be inadmissible when it comes to the court case. The fact that the story may have been written elsewhere e.g. in other press articles, may suggest that it is true, particularly if no legal action has been taken over those articles. However, press articles are not admissible evidence in court of the truth of what has been printed. In addition, be very careful about relying on information found on the internet.

Since we may well have to prove the truth of allegations being made in programmes at some later date, it is essential that all evidence e.g. statements from witnesses, documents, journalists' notebooks, contemporaneous notes of phone calls are retained. Note also that, as a matter of good practice, since material such as rushes, notebooks etc. may need to be disclosed, any pejorative comments or comments which could be open to a hostile interpretation, even where that is not the intention - should be avoided. If a case goes to court, programme-makers may well be cross-examined on what they have written in their notebooks or said while the camera is running.

OPPORTUNITY TO RESPOND OR 'RIGHT OF REPLY'

Invariably, where defamatory allegations are made, programme-makers and broadcasters will seek a response from the subject of the allegations on what is being alleged. This is important not only in that it serves as a final accuracy check – sometimes the subject of the allegation may reveal something only he or she knows that sheds new light on the facts – but also is very important in ensuring fairness to the subject of the allegations. This is particularly important where programme-makers and broadcasters may have some difficulty in actually proving the truth of the allegations and are relying on other defences e.g. 'Reynolds privilege'. It is most unlikely that a broadcaster would be able to avail itself of a 'Reynolds Privilege' defence if it had not sought a response from the subject of the allegations before broadcast and fairly reflected that response, where one was given, within the programme. [See 'Opportunity to Respond', within Chapter 4C, Fairness].

WHAT IS DEFAMATORY?

Although by no means an exhaustive list, the following are likely to be defamatory.

- Individual, X, (who may or may not be named explicitly) has committed some criminal or seriously anti-social act ...
- X is a liar, is dishonest or has committed a fraudulent act ...
- X took a bribe; X tried to bribe Y ...
- X stole from Y; X is a thief ...
- X is violent or abusive in some way ...
- X damaged Y's property ...
- X is a drug dealer, a drug user or, simply, 'is involved in' drugs ...
- X is a hypocrite ...
- X is bankrupt; is nearly bankrupt or has serious financial problems ...
- X owes money which he won't (or can't) pay back ...
- X sexually assaulted or harassed Y ...
- X is sexually perverted in some way ...
- X had sex with an underage girl or boy; X is a paedophile ...
- X is cheating on his wife, her husband or his/her long term partner ...
- X is gay (when X is married or claims publicly not to be gay) ...
- X is sexually promiscuous ...
- X has had plastic surgery (when it's been denied previously) ...
- X 'framed' Y for a crime ...
- X (particularly policeman) planted evidence, 'fitted up' Y, forced an untrue confession ...
- X was negligent in some way, was guilty of a dereliction of duty ...
- X harassed Y, was a nuisance ...
- X's activities are putting others at risk, in danger, damaging the environment ...
- X exploits others in some way ...
- Company Z is dishonest (for whatever reason) ...
- Z's products are dangerous or unhealthy e.g. cause cancer ...
- Z's products are substandard, of poor quality etc ...
- Z's methods of production, operating methods or activities are putting employees, customers, the public at risk in some way ...
- Z's activities are damaging the

environment ...

- Z exploits its workers in some way e.g. uses child labour, low pay, uses sweat shops ...
- Z is bankrupt, is nearly bankrupt or is in financial trouble ...

DEFAMATION -V- ABUSE

Note: defamatory statements can be distinguished from mere abusive ones in that they say something about the person being criticised that goes beyond mere insult. For example it would generally not be defamatory to say something like "*I hate X, he's a tosser*" or "*I've got no time for X, he's a wanker*", but it would be defamatory to say "*I hate X, he's a tosser, he stole my bicycle*" or "*I've got no time for X, he's a wanker and a liar*". Someone hearing the former statements would conclude that the speaker didn't like X but it wouldn't make them think less of X themselves. The latter statements, however, which attribute some anti-social or reprehensible actions on X's part are likely to make right-thinking people think less of him and are, therefore, potentially defamatory.

PRACTICAL CONSIDERATIONS

Programme-makers, when considering whether or not a potentially defamatory statement or sequence can remain in a programme, should have regard to the following:

- the nature and seriousness of the allegations/criticism. Obviously, the more serious the allegation, the more stringent proof is likely to be required;
- what steps have been taken to verify that the allegations/criticism are justified and what evidence there is to prove the truth of the allegations/criticism;
- who the subject of the allegations is and whether he/she/it would be likely to object to the remark, or be likely to sue;

- whether the subject of the allegations/criticism has been told the allegations and given an appropriate opportunity to respond and whether their side of the story has been fairly included within the programme. If not, why not?;

- whether the allegations/criticism have been published before. If so, where have they been published and with what consequences, if any? For example, perhaps the story is old news, has been in the newspapers before or perhaps the subject has even admitted the allegation.

Finally, always remember that libel proceedings are extremely costly to fight and since, in most cases, a jury will decide liability and damages, can be unpredictable. All potentially defamatory statements must be checked for accuracy very carefully. Legal advice should be sought at the earliest opportunity.

Example

A programme has been commissioned about the closure of a large manufacturing company. The programme-makers interview some employees who have lost their jobs. Some of those interviewed criticise the management of the factory and blame the directors for the company's demise. The company is named and the directors, of which there are only a handful, are identifiable. In addition, a couple of interviewees talk about the directors' incompetence in making specific business decisions which turned out to be damaging to the company. One of the interviewees even suggests that the directors stole money from the firm.

To suggest that the directors are incompetent is defamatory. If these comments are to remain in the programme, the programme-makers must first find out on what basis the interviewees make the allegation i.e. what are the damaging business decisions he refers to. They would then need to make proper and rigorous journalistic enquiries to corroborate the facts i.e. that in fact these business decisions were made, that they were damaging to the company and that they were made by the directors (each of them). These facts might be corroborated by speaking to others that have direct

knowledge of what happened or perhaps there is documentary evidence e.g. copies of letters, company resolutions, emails. The programme-makers may also need to speak to an expert in business matters for confirmation and an explanation of why the decisions that were taken could be classed as incompetent.

If the programme-makers were unable to corroborate the facts, it is likely that the comments would not be able to be included. However, if they were corroborated satisfactorily and the interviewees' comments seemed reasonable based on the facts (which are provable), then, but only then, should the programme makers/broadcaster move towards seeking a response from those that were criticised.

Comments about directors stealing money are of course defamatory and would require very rigorous proof. On what basis is the allegation being made? What proof does the person making the allegation actually have? Is it just rumour, unsupported by evidence or hard facts? A broadcaster would need very convincing evidence i.e. convincing testimony of reliable witnesses of fact and/or documentary evidence to prove this allegation before moving towards seeking a response from the subject(s) of the allegations.

FAQs

Q. What Is Defamatory?

A. Although by no means an exhaustive list, the following are likely to be defamatory.

- Individual, X, (who may or may not be named explicitly) has committed some criminal or seriously anti-social act ...
 - X is a liar, is dishonest or has committed a fraudulent act ...
 - X took a bribe; X tried to bribe Y ...
 - X stole from Y; X is a thief ...
 - X is violent or abusive in some way ...
 - X damaged Y's property ...
 - X is a drug dealer, a drug user or, simply, 'is involved in' drugs ...
 - X is a hypocrite ...
 - X is bankrupt; is nearly bankrupt or has serious financial problems ...
 - X owes money which he won't (or can't) pay back ...
 - X sexually assaulted or harassed Y ...
 - X is sexually perverted in some way ...
 - X had sex with an underage girl or boy; X is a paedophile ...
 - X is cheating on his wife, her husband or his/her long term partner ...
 - X is gay (when X is married or claims publicly not to be gay) ...
 - X is sexually promiscuous ...
 - X has had plastic surgery (when it's been denied previously) ...
 - X 'framed' Y for the crime ...
 - X (particularly policeman) planted evidence, 'fitted up' Y, forced an untrue confession etc. ...
 - X was negligent in some way, was guilty of a dereliction of duty ...
 - X harassed Y, was a nuisance ...
 - X's activities are putting others at risk, in danger, damaging the environment ...
 - X exploits others in some way ...
-
- Company Z is dishonest (for whatever reason) ...
 - Z's products are dangerous or unhealthy e.g. cause cancer ...
 - Z's products are substandard, of poor quality etc ...
 - Z's methods of production, operating methods or activities are putting employees, customers, the public at risk in some way ...
 - Z's activities are damaging the environment ...
 - Z exploits its workers in some way e.g. uses child labour, low pay, sweat shops etc. ...
 - Z is bankrupt, is nearly bankrupt or is in financial trouble ...

Q. We're not saying it, the contributor is. So that's okay?

A. No. This is a surprisingly common mistake. It makes no difference that the defamatory remark is made by a contributor, as opposed, say, to being in voice over. The fact is that as the production company making the programme and the broadcaster transmitting it, we are assisting or contributing to the publication and that means in law we are potentially liable. Whilst the contributor who made the remark will also be liable, in practice, claimants (i.e. those suing) almost always pursue the party with the most resources which is normally the broadcaster and production company.

Q. If we prefix the remark with "allegedly" does that get us off the hook?

A. No. Prefixing a defamatory remark with the word "allegedly" may, in certain circumstances, be useful in terms of clarifying the status of the particular allegation and thereby possibly lowering the defamatory meaning, but by no means is it likely in itself to provide any sort of legal defence. Wherever potentially defamatory material is to be included within a programme, advice must be sought from the programme lawyer so that a thorough assessment can be made of the potential risks and what, if any, further action is required before the material in question can be broadcast e.g. a response from the subject of the allegations needs to be sought.

Q. It was a joke, he didn't mean it. So that's okay?

A. No and in fact making a defamatory remark about an individual or organisation as a *joke* could potentially make matters worse, in that it could rule out certain legal defences that might otherwise be available. What is important here is not what the person making the remark intended but, rather, how a reasonable viewer would understand it. If the defamatory statement in question was capable of being understood by a reasonable viewer as an assertion of fact, then all those contributing to the publication i.e. the person making the remark, the production company, broadcaster etc. would be potentially liable.

Q. But surely that's fair comment?

A. "Fair comment" means different things to different people but as a legal defence to an action for defamation, it is strictly defined. The defence of 'fair comment' protects sincere opinion (not statements of fact), based on true facts known by the speaker at the time of stating the opinion, on matters of public interest. In other words the opinion must be based on true facts which are provable, concern a matter of public interest and be one which is honestly held by the speaker. If any one of these elements is missing, the defence fails. Fair comment, therefore, as a legal defence is not as straightforward as is often thought and should only be relied upon after seeking legal advice.

Q. Why can't we say it, it's been in the papers and all over the internet?

A. Just because a story has appeared elsewhere in the media does not mean that it is true. Libel actions are settled and substantial damages are paid day in day out by media organisations that have got things wrong. As responsible broadcasters, any material which is potentially defamatory must be cleared by the relevant programme lawyer,

regardless of how widely it has been reported elsewhere. Whether the allegation in question has been broadcast or published widely before will obviously be a factor in determining whether the risk in repeating it is acceptable, but it is only one factor. What is likely to be most important is whether the allegation is true and provable.

Q. If we bleep the name, can we keep it in?

A. For an individual or organisation to be able to sue for defamation, they would need to be able to show that the defamatory remark was said about them and that they were identifiable from the broadcast. Clearly an individual or organisation (or class of either) does not need to be named in order to be identifiable if other information (verbal or visual) could reasonably lead to their identification. For this reason, whilst there may be occasions where merely bleeping a name would suffice to remove entirely any libel risk, in most cases the matter is likely to more complex. Seek advice.

Q. Can we say it if everyone knows it to be true, even if there isn't actually any evidence?

A. No, or at least it would be very unlikely. In English law, when a party sues for defamation, the burden of proving the truth of a defamatory statement falls on the party responsible for the publication i.e. normally the broadcaster. It follows that if that initial burden cannot be discharged, because there is no evidence e.g. witness testimony, documentary evidence etc., there is simply no defence and the claimant's action would succeed.

5B.

CONTEMPT AND REPORTING LEGAL PROCEEDINGS

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KEY POINTS

- What is contempt? The law of contempt bans the media from broadcasting comments or information that would create a substantial risk of serious prejudice to active UK legal proceedings, in particular criminal proceedings heard before juries. It is also possible to commit a contempt by intentionally seeking to prejudice legal proceedings even where they are not active.
- Penalties for contempt. Contempt of court is a criminal offence and carries serious penalties: an unlimited fine and/or up to two years imprisonment of the relevant personnel responsible for the offending publication or broadcast which would normally be the editor. Other financial penalties may also be imposed in certain circumstances.
- Examples. Many activities are capable of amounting to a contempt, including: obtaining or publishing details of jury deliberations; breaching reporting restrictions or a specific court order; making payments to witnesses; filming or recording inside court buildings; publishing information obtained from confidential court documents in both civil and criminal proceedings.
- Reporting legal proceedings. The laws that restrict the reporting of legal proceedings are numerous and varied. Many relate to the identification of children and the victims of sexual offences. This is a complex area of law and legal advice must be sought at an early stage and certainly before filming. To breach most reporting restrictions is to commit a criminal offence.

CONTEMPT OR 'SUB-JUDICE' RULES

WHAT DOES IT MEAN TO BE IN CONTEMPT?

Also known as the 'sub-judice' rules, contempt is a criminal offence. There are two types of contempt: statutory and common law. Both involve interfering with legal proceedings in the UK. There is no exhaustive list of what constitutes "legal proceedings" but it includes, for example, the main courts e.g. magistrates' court, county court, high court and also inquests, military courts and industrial tribunals. Hearings before the Professional Conduct Committee of the General Medical Council are not included.

WHAT IS PROTECTED?

Statutory contempt law bans the media from publishing or broadcasting, including on the internet, any comments or information that might seriously prejudice active legal proceedings, in particular criminal proceedings heard before juries. The concern is that a juror might hear or see something outside of the courtroom that would sway him/her when he/she is deciding whether an accused person is innocent or guilty.

THE LEGAL TEST

In short, once legal proceedings become "active", it is a criminal offence for media organisations to broadcast material which would create "a substantial risk of serious prejudice" to the proceedings. Criminal proceedings become "active" as soon as one of the following has occurred: a person is arrested, a warrant for arrest is issued, a summons has been issued, or a person has been charged, and they remain so until such time as the accused has been acquitted or convicted. Civil proceedings e.g. libel proceedings, become active when the hearing date for the trial is arranged and, in Scotland, when the record (written case) is closed.

Once a person has been convicted, whether or not they have been sentenced, proceedings cease to be 'active' and there is much more scope for commenting on the proceedings and making comments about the convicted person/publishing material which it was not possible to disseminate before or during the trial.

Finally, note that UK contempt laws only apply to legal proceedings that are taking place in the UK. You could not, therefore, be in contempt of US legal proceedings for broadcasting prejudicial material in the UK.

WHO CAN BE PREJUDICED?

It is not just potential jurors who might be prejudiced by what is broadcast. People giving evidence in proceedings i.e. witnesses, may also be prejudiced by what they see or hear on television. In addition, although professional judges are considered largely to be immune from being prejudiced by what they see and hear outside of the courtroom, some courts are presided over by lay people e.g. most Magistrates' Courts, and the law assumes that such people acting in a judicial role can be prejudiced in their deliberations.

LIABILITY

Liability for statutory contempt is 'strict', which means that the broadcaster's and programme-maker's knowledge or intention is irrelevant, as is the fact that no actual prejudice was caused in a particular case – the risk of prejudice is sufficient. If a contempt was committed intentionally, however, it would be punished even more severely.

Common law contempt consists of any other action which is intended to interfere with the administration of justice e.g. a sustained campaign by the media to influence legal proceedings. It is important to bear in mind that proceedings need not be active.

Example

A classic example of a contempt is the publication or broadcast, once proceedings are active, of the fact that a person charged with a criminal offence has a previous criminal record. This is not something which, in the vast majority of cases, members of the jury would know before deciding whether the person charged is guilty or not guilty. Indeed such information is generally deliberately withheld from juries because it is deemed so prejudicial. Broadcasting this information, therefore, would create a substantial risk that people who may subsequently serve on the jury would be swayed in their consideration of the facts and in making their verdict.

PENALTIES FOR CONTEMPT

Contempt of court is a criminal offence and carries severe penalties: an unlimited fine and/or up to two years imprisonment of the relevant personnel responsible for the offending publication or broadcast – normally the Editor. It should be noted that the law is interpreted more strictly in Scotland.

THIRD PARTY COSTS ORDERS

The courts have relatively recently been granted a power which enables them to force third parties e.g. media organisations, to pay any costs which have been wasted in criminal trials, as a result of that party's "serious misconduct". Thus, in addition to the penalties for contempt, a media organisation could find itself faced with a bill for part of, or the total cost of, an aborted trial, for example where postponement or cancellation of the trial was caused by the prejudicial reporting of one of its journalists.

Fines made against media organisations for contempt, where trials have been cancelled, have traditionally been in the order of tens of thousands of pounds. Clearly, third party costs orders could run

into hundreds of thousands of pounds or even millions. It is, therefore, extremely important that all references to active legal proceedings in programmes are referred to the programme lawyer for approval at an early stage and that detailed research is undertaken to ascertain the status of any legal proceedings.

Here are some further activities that would or could be in contempt:

- Obtaining or publishing details of jury deliberations. See below.
- Reporting of court proceedings in breach of a court order or certain reporting restrictions. See 'Reporting Legal Proceedings' below.
- Anticipating the course of a trial or predicting the outcome.
- Publishing details of a defendant's lifestyle, if relevant to the charge.
- Making payments to witnesses (note that, in addition, this is likely to be prohibited under regulatory rules. See Chapter 4B, Crime).
- Filming or recording inside court buildings. See below.
- Revealing the identity of victims of sexual offences without written consent, which can only be given if over 16 years of age. See 'Reporting Legal Proceedings' below.
- Reporting proceedings concerning wardship, adoption, other children related hearings, Mental Health Act applications and national security. See 'Reporting Legal Proceedings' below.
- Reporting criminal proceedings and identifying a child as a defendant, witness or victim. See 'Reporting Legal

Proceedings' below.

- Breaching an injunction obtained against another party.

INTERVIEWING JURORS

It is a contempt of court " ... to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations in any legal proceedings".

On no account must programme-makers make any approach or speak to jurors or potential jurors about the legal proceedings in which they are or were involved without taking legal advice.

TAPE RECORDINGS, PHOTOGRAPHS & SKETCHES

It is a contempt of court for anyone i.e. public or press, to use, or take into court for use, a tape recorder or other recording device, without the consent of the Court. Similarly it is a contempt to use or publish any such recording. The court may in its discretion allow such recordings to be made. To be safe, programme-makers who are attending court should not take into court recording devices even where there is no intention of using them.

Taking photographs, filming and sketching (if intended for publication) is also prohibited in court. This includes not just inside the courtroom but anywhere within the court building and its precincts. Filming parties to proceedings as they arrive and leave the court house is also technically forbidden but in practice this rule is not enforced e.g. pictures of defendants and witnesses arriving and leaving the Royal Courts of Justice or the 'Old Bailey' are commonly shown. Regarding sketching, whilst sketching in court is prohibited if intended for publication, attending court, memorising proceedings and then making a sketch afterwards is permissible.

DOCUMENTS/INFORMATION OBTAINED FROM PARTIES TO CIVIL/CRIMINAL PROCEEDINGS

Civil Proceedings

In civil proceedings, relevant documents are released to the court by both parties, during the process of 'disclosure'. There is an implied undertaking on parties not to use documents disclosed in this way for any other purpose than the proceedings, except in limited circumstances e.g. where the document has been read to or by the court or referred to at a hearing in open court. To do otherwise is likely to be a contempt. Similarly, a journalist publishing or broadcasting information emanating from such documents, knowing where it came from, would be in contempt.

For example, a programme-maker may be researching a programme about negligence in the medical profession and looking at particular cases of litigation. One of the parties to the litigation passes him documents which they have received from the other side. This may be a contempt and the programme-maker's use of such documents in any programme may be a further contempt. Seek legal advice.

Criminal Proceedings

Similarly, in criminal proceedings, use of any document which is disclosed by the prosecution or defendant (or co-defendant) in the course of proceedings is likely to be restricted to use within those proceedings. One exception is that the accused may use or disclose the object or information contained in a document to the extent that it has been displayed or communicated to the public in open court. This is even more restrictive than the provisions governing civil proceedings. For example, a programme-maker may be investigating a miscarriage of justice and the person convicted may pass him documents/statements that were disclosed to him/her

by the prosecution to look at. These actions could give rise to an offence which a programme-maker could have incited by the investigation. Legal advice should always be sought.

REPORTING LEGAL PROCEEDINGS

There is a long established principle that legal proceedings should be conducted openly and held in public. However, the law also recognises that there will be occasions where, in the interests of justice or to protect the rights of individuals, it is necessary to curtail the reporting of legal proceedings e.g. to postpone court reporting, to prevent publication of the names of certain parties, or to prohibit or limit the nature of the evidence that is reported.

The laws that restrict the reporting of legal proceedings are numerous and varied. Many relate to the identification of children and the victims of sexual offences. In most cases, courts will order that children who are the subject of or who are witnesses in proceedings and, also, the victims of sexual offences cannot be identified.

This is a complex area of law and legal advice must be sought at an early stage and certainly before filming. To breach most reporting restrictions is to commit a criminal offence.

Below is a brief summary of the law as it stands.

POSTPONING COURT REPORTING

Courts have the power to postpone the publication of any report relating to proceedings, for any length of time necessary - under s.4(2) of the Contempt of Court Act 1981. Before such an order is made, the Court should be satisfied that postponement is necessary to avoid a substantial risk of serious prejudice to the

proceedings or pending proceedings. When imposing such restrictions, the court should set a specific date on which the restrictions will cease. Normally this will be at the conclusion of the trial or a series of trials e.g. the reporting of matters in one case might be prejudicial to a later, separate trial and, thus, the court may order that the first trial cannot be reported until the later one has concluded.

PREVENTING IDENTIFICATION OF PARTIES

Courts have the power, even in relation to proceedings in open court, to order that certain material, including the names of parties, should be kept secret from the public sitting in court and, where that is the case, also from any media reporting of the case. However, such orders tend to be rare and reserved for cases where to publish the material to the public would frustrate or render impracticable the administration of justice, rather than where a witness or defendant simply prefers to remain anonymous.

COMMITTAL PROCEEDINGS

Committal proceedings take place in the Magistrates' Court when a criminal case is being referred to the Crown Court e.g. because the defendant has elected trial by jury (and is entitled to do so) or the case is so serious that the sentencing powers of the Magistrates' Court are insufficient. Such proceedings are normally held in public but what can be reported is restricted by law. Wherever there is any intention to make reference to Committal Proceedings in programmes, producers must seek early advice from the programme lawyer.

LEGAL PROCEEDINGS INVOLVING UNDER 18s

[See also regulatory provisions at Chapter 4B, Crime]

People under 18 can be involved in all kinds of legal proceedings and in recognition of the fact that they are generally more vulnerable than adults, the law seeks to protect their rights in a number of ways.

Youth Courts

Most alleged criminal offences committed by people under 18 are dealt with by the Youth Court (in Scotland by the Children's Panel), unless the matter is very serious, in which case it may be referred or 'committed' to the Crown Court (in Scotland, the Sheriff Court).

Reports of proceedings in the Youth Court must not contain the name, address, or school or any particulars likely to lead to the identification of anyone under 18 involved in the proceedings as defendant or witness or contain a photograph showing any such juvenile. Adults involved in Youth Court proceedings can be identified as long as, in doing so, this does not identify any juvenile involved in the proceedings.

These rules do not apply where a juvenile has been committed to the Crown Court (but see 'Section 39 Orders' below). Note that a Youth Court may lift these automatic restrictions in certain circumstances but the juvenile cannot waive the protection even if he or she actively wants to be identified. Once a juvenile who has been involved in Youth Court proceedings reaches 18, the reporting restrictions no longer apply and the once juvenile, now adult person, can be identified in relation to the offence.

Adult Courts

In all other courts, there is no automatic restriction prohibiting the identification of people under 18 involved in the proceedings or of publishing material likely to lead to their identification. However, in many cases where people under 18 do appear in legal proceedings, either as defendants or witnesses, the court will make an order

expressly banning identification and certain other information likely to lead to their identification. Such orders are commonly referred to as 'Section 39 Orders', named after the section of the Children Act 1933 which gives the courts the power to direct that "... *no report of the proceedings shall reveal the name, address, or school or include any particulars likely to lead to the identification of any child or young person concerned in the proceedings as being the person by or against or in respect of whom the proceedings are taken, or as being a witness; and, no picture shall be published of any child or young person so concerned*".

Note: if a Magistrates' Court makes a s.39 Order and then commits the case to the Crown Court, that order will not apply to the proceedings before the Crown Court. The Crown Court would need to make its own Order banning identification of the particular child. Please also note that different but similar legislation applies in Scotland.

Jigsaw Identification

Even where a particular media organisation takes steps to ensure that a child involved in legal proceedings is not identified by a report, there is always the risk of 'jigsaw identification' of the juvenile i.e. through one media organisation giving certain details and omitting others but one or more other media organisations giving/withholding different information so that, when everything published is taken together, the juvenile is identifiable. Care must be taken to avoid this.

In addition, it is worth noting the provisions of the Press Complaints Commission Code (which governs the printed media) in relation to the reporting of sexual offences against children, in order to avoid jigsaw identification. It states that in such cases: 1) the child must not be identified; 2) the adult may be identified; 3) the word

'incest' must not be used where a child victim might be identified; and 4) care must be taken that nothing in the report implies the relationship between the accused and the child. Points 3) and 4) offer useful, practical guidance when reporting on such matters.

ANTI-SOCIAL BEHAVIOUR ORDERS ("ASBOS")

ASBOs are a relatively recent addition to the courts' armoury to deal with anti-social behaviour and can be imposed on any defendant over the age of 10. In relation to juveniles, the police or a local authority may apply to magistrates to impose an ASBO in respect of certain anti-social behaviour or a Youth Court may impose one as part of its sentence, after it has found a particular young defendant guilty of a criminal offence.

In the former case there is no automatic prohibition on identifying the juvenile concerned, although of course the court may make a section 39 Order if it considers it appropriate in all the circumstances. In the Youth Court, again there is no automatic prohibition on identifying the juvenile in relation to the decision to impose an ASBO but there is the automatic restriction in relation to the proceedings before the Youth Court generally (s.49). In addition, like in any other court, the Youth Court may deem it appropriate to impose a section 39 Order specifically in relation to imposition of the ASBO.

Alternatively, the Youth Court, may deem it appropriate to lift all reporting restrictions thereby enabling identification of the juvenile in relation both to the crime he/she was convicted of and the application/imposition of the ASBO.

If a juvenile breaches the terms of an ASBO this will normally be dealt with by the Youth Court and the normal automatic restrictions on identification do not apply.

However, the Youth Court may impose a section 39 order if it considers it appropriate.

PROCEEDINGS INVOLVING SEXUAL OFFENCES

Victims of the vast majority of sexual offences (including male rape) are guaranteed anonymity by the law, under the Sexual Offences (Amendment) Act 1992 and the Sexual Offences (Amendment) Act 1976 (as amended by the Criminal Justice Act 1988). Once the allegation has been made that a person has been the victim of such an offence, no matter may be published or broadcast which would be likely to lead members of the public to identify that person as someone against whom such an offence had been alleged to have been committed. Anonymity remains in force for the lifetime of the victim, even where the allegation is withdrawn or the accused acquitted. However, in certain circumstances, magistrates or the trial judge may lift the automatic rule of anonymity. In addition, victims themselves can choose to waive their right to anonymity, if aged 16 years or over, without the consent of the court. Any broadcaster relying on this must, however, seek the victim's consent to waive his/her right to anonymity in writing and such consent must not be given under duress i.e. they must not be placed under any pressure.

There is no automatic legal anonymity for defendants i.e. those accused, in sexual offences cases.

Where a breach of these reporting restrictions is alleged, it would be a defence to prove that the person responsible for the broadcast was not aware or had no reason to suspect that publication was in breach of the sexual offences anonymity provisions. Note: the situation in Scotland is different as there is no statutory restriction but in practice press and broadcasters maintain anonymity for victims of sexual crime. This is a prerequisite

for being allowed to remain in Court when victims are giving evidence.

REPORTING FAMILY PROCEEDINGS

Family proceedings e.g. proceedings relating to the care or supervision of children, or to arrange contact between parents and children, can be heard in a number of courts: the Magistrates' Court, the County Court or the Family Division of the High Court. Different rules apply depending on which court the proceedings are taking place in but the effect is predominantly the same – in general children cannot be identified in connection with the proceedings.

In Magistrates' courts two separate provisions (in different Acts - Section 71 of the Magistrates' Court Act 1980 and Section 97 of the Children Act 1989) apply to reporting family proceedings which, when combined, effectively mean that the child cannot be identified and few details of the case can be given. Section 97 makes it an offence to publish any material which is intended or likely to identify any child under 18 as being involved in the proceedings.

The restrictions of Section 97 also now specifically apply to family proceedings in the County Court and Family Division of the High Court.

Where family proceedings in any court are held in private, then even further restrictions apply. Section 12 of the Administration of Justice Act 1960 states that whilst publication of information about proceedings held in private or in chambers is not in itself a contempt, it is a contempt to report on proceedings in private involving, amongst others, wardship, cases involving the Children Act 1989 and other proceedings relating wholly or mainly to the maintenance or upbringing of children.

WARDSHIP

Wardship proceedings are usually heard by County Court or High Court judges in chambers and, under section 12, it is a contempt to publish any account of family proceedings heard before a judge in chambers e.g. evidence before the court, information contained in medical reports. When combined with the other legal restrictions that apply this means that the child could not be identified as being a ward of court or as being involved in Children Act proceedings and on no account, regardless of whether or not the child was identifiable in the programme, could any report of the proceedings be included. Note however that, in the absence of an injunction preventing it, there would be nothing to prevent filmmakers filming and interviewing a child who was a ward of court - as long he/she wasn't identified as being a ward of court or connected with Children Act proceedings. In theory, there would be nothing to stop a child, who was a ward of court, appearing on a reality television show or game show, as long as no reference was made to the fact they were ward of court or to any legal proceedings concerning the wardship. Similar restrictions apply in adoption proceedings.

DIVORCE PROCEEDINGS

Divorce cases these days are rarely contested but where they are, they are subject to certain reporting restrictions. Refer to the programme lawyer.

Reporting legal proceedings is a complex area of law and legal advice must be sought at an early stage and certainly before filming begins.

FAQs

Q. One of our contributors has been arrested. What should we do?

A. Contact your programme lawyer immediately. Clearly, the repercussions of such an event would depend on the particular circumstances e.g. the type of offence for which the contributor was arrested, the nature of the programme, the nature of the contribution.

Q. An individual featured in our programme is on bail but has not been charged. Can they be included?

A. Again, it would depend entirely on the particular circumstances i.e. the type of offence for which the potential contributor has been arrested and bailed, the nature of the programme, the nature of the proposed contribution. Contact the programme lawyer immediately for advice.

Q. The subject of the programme has been convicted but not sentenced. Can we go ahead and broadcast?

A. In all likelihood, yes, but in such circumstances programme-makers must seek advice from the programme lawyer. The fact that the subject of the programme has been convicted means that the jury element of the legal proceedings are concluded and proceedings are no longer deemed to be "active", for the purposes of strict liability contempt. However, there could potentially be other reasons why the programme could not be broadcast e.g. proceedings in respect of other criminal charges may remain 'active', or there may be a specific court order preventing publication of certain details of the case. With any television programme concerning a current criminal legal case, the programme lawyer should be very closely involved and so would be able to advise on the specifics of the particular case.

Q. Can you be in contempt of an Appeal?

A. Potentially yes. Under the Contempt of Court Act 1981, appeal proceedings become "active" from the time of application for leave or the lodging of a notice of appeal. However, because appeals are heard by professional judges, rather than lay jurors and tend to concern points of law and procedure, the risk of prejudicing such proceedings is generally much lower than with jury trials in the Crown Court.

Q. What kinds of proceedings are covered by the law of Contempt?

A. There is no exhaustive list of what constitutes "legal proceedings" but it includes, for example, the main courts e.g. Magistrates' Court, County Court, High Court, Appeal Courts and also inquests, military courts and industrial tribunals. Hearings before the Professional Conduct Committee of the General Medical Council are not included.

Q. Why can't we talk about the case, the newspapers are full of it?

A. Newspapers and television news programmes often publish/broadcast fair and accurate reports of on-going trials. This means that once a trial has started, the newspaper or news programme's court reporter does a report outlining that day's evidence and proceedings. Such contemporaneous, fair and accurate reports are only permissible (i.e. they do not amount to a contempt) where they are contemporaneous i.e. are published very soon after the hearing, are a fair and accurate summary of the day's proceedings and relate to proceedings held in public. The reports must be carefully written and not distort what was said in court. Such reports are generally included for each day of the trial so that a summary of all the evidence i.e. both prosecution and defence, is covered. Clearly, such 'fair and accurate reporting' would not be suitable or indeed possible for most types of programmes.

Q. A contributor is willing to talk on camera about being raped. Can she be identified?

A. It is a criminal offence for the media to identify the victims of most sexual offences e.g. rape, attempted rape, indecent assault etc.. However, the legislation which creates this offence includes a defence to the charge of breaching the anonymity rule i.e. that the victim (who must be over 16) has given freely (i.e. was not placed under any duress) his or her written consent for the publication or broadcast in question. Clearly, wherever it is intended to feature someone talking about being the victim of a sexual offence, seek advice from the programme lawyer at an early stage.

Q. A contributor cannot be identified for legal reasons. To ensure we're not in contempt, what measures do we need to take to ensure he is unidentifiable?

A. In short, we must do whatever is necessary to ensure that the person in question is not identifiable. Visually, this may mean: pixilating the person's face or even more of their image (if they have some distinctive feature e.g. a particularly unusual hair style that friends or work colleagues might recognise); filming the person in silhouette; or, altering their voice or even entirely replacing it with the voice of an actor. In addition, we must be very careful about exactly what information we broadcast about the person, taking into account what information is already in the public domain, so that viewers wouldn't be able to piece all the information together and identify the person in question.

5C. PRIVACY, CONFIDENCE & DATA PROTECTION

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KEY POINTS

Legal Protection of Privacy

- English law now recognises a right to privacy and will intervene to protect individuals' privacy rights.
- A court which is considering granting an injunction preventing broadcast of a television programme on the basis of infringement of privacy must consider whether it is in the public interest for the material to be published and also the extent to which the broadcaster has complied with the Ofcom Broadcasting Code. Compliance with the privacy rules and practices contained within the Code is therefore likely to ensure a programme complies with the law.
- The Protection From Harassment Act 1997 makes it a criminal offence to engage in a course of conduct which amounts to harassment of the subject. There is no specific defence for journalists. In addition, the subject of the harassment may seek damages from the harasser, apply for an injunction after only one act of harassment and apply to the court for an arrest warrant to be issued if the harasser breaches any court order. Compliance with the provisions of the Code on fairness and privacy would assist in any defence. See Fairness and Privacy chapters 4C and 4D respectively.

Legal Protection of Confidential Information

- The law protects confidential information from being improperly divulged and if a broadcaster publishes confidential information without authorisation, they risk being sued by the individual or organisation whose confidence has been betrayed. In addition, if the party whose confidence is about to be betrayed becomes aware of it before broadcast, they will normally apply to the court for an injunction to prevent the confidential information being disseminated.

If successful, this is likely to mean that the programme cannot be broadcast.

- The law of confidence can be one of the easiest ways for an individual or organisation to use the law to stop a programme being broadcast, by obtaining a pre-transmission injunction.
- If an injunction is granted, even against some other media organisation, all media organisations who are aware of its existence will be similarly bound by it. Breaching an injunction is to commit a contempt i.e. a criminal offence.
- The main defence to any legal action for breach of confidence, or an application for an injunction based on breach of confidence, is that there is an overriding public interest in publication e.g. it was necessary to expose crime, corruption, anti-social behaviour or injustice. See definition of 'Public Interest' at Chapter 4D.
- Wherever a programme may reveal confidential information, advice must be sought from the programme lawyer at an early stage.

Legal Protection of Personal Information

- Broadcasters and programme-makers must comply with the provisions of the Data Protection Act 1998, which protects individuals' personal privacy rights and the way personal information about them is 'processed'. The act contains a number of principles that people 'processing' personal data, including programme-makers, journalists and editorial staff, must comply with and provides even greater protection to 'sensitive personal data'. It also grants the data subject a number of rights in relation to the information that organisations hold about them.
- Personal information which is processed only for journalistic purposes is exempt

from many provisions of the Data Protection Act which otherwise would stifle and prohibit honest journalistic practices. However, the journalistic exemption only applies if the processing is done with a view to publication of material which has not previously been published. Once a programme has been broadcast, programme-makers and broadcasters must comply with the data protection principles and comply with any subject access requests. Furthermore, the journalistic exemption only applies if the broadcaster reasonably believes that publication would be in the public interest and that, in all the circumstances, to comply with the rules of the Act would be incompatible with journalistic purposes.

PRIVACY, CONFIDENTIALITY AND DATA PROTECTION

LEGAL PROTECTION OF PRIVACY

Until relatively recently, UK law did not recognise a legal right to privacy. However, since the introduction of the Human Rights Act 1998 and the Scotland Act, which incorporated the European Convention on Human Rights into UK law and which, by Article 8, guarantees a right to privacy, individuals can now seek to enforce that right through the courts i.e. individuals and organisations can seek an injunction to prevent broadcasters from unjustifiably infringing their privacy or, after broadcast, may sue for damages. This has been achieved by the UK courts adapting the existing law relating to confidential information to cover privacy claims.

Right to Privacy –v– Right to Freedom of Expression

When deciding whether or not there has been or is likely to be an infringement of privacy and, if so, whether or not it is justified, the Court, taking into consideration all the facts and circumstances of a particular case, will seek to balance the individual's right to privacy, under Article 8, with the programme makers' and broadcaster's right to freedom of expression under Article 10 of the Convention.

Public Interest & Compliance with the Code

The law states that wherever a court is considering granting an injunction preventing broadcast of a television programme, the Court must, amongst other things, have particular regard to the extent to which it is or would be in the public interest for the material to be published and also the extent to which the broadcaster has complied with 'any

relevant privacy code' i.e. the Ofcom Broadcasting Code. Thus, whether or not publication is justified will generally turn on whether or not there is an overriding public interest, which is consistent with the privacy provisions of the Code. See Chapter 4D, Privacy.

A detailed discussion of the law of privacy and emerging case law is outside the scope of this Handbook but producers should read Chapter 4D of this Handbook, which contains a summary of the regulatory provisions relating to privacy and a detailed discussion of how to ensure that programmes do not unjustly infringe the privacy rights of others. Compliance with the privacy rules and practices contained within the Code is likely to ensure that a programme complies with the law.

Protection from Harassment Act 1997

Whilst this piece of legislation was principally intended to deal with stalking, it can have implications for journalists and their activities. The Act creates both civil and criminal liabilities for journalists.

It is a criminal offence to engage in a course of conduct which one knows or should know amounts to harassment of the subject. There is no specific defence for journalists. The only relevant defences are the prevention or detection of crime which are unlikely to apply to journalists; or that in the circumstances the conduct was reasonable.

In addition, through a civil action, the subject of the harassment can:

1. seek damages from the harasser for any anxiety caused and for any resulting financial loss;
2. apply for an injunction after only one act of harassment if they can show that future harassment is likely; and

3. apply to the Court for an arrest warrant to be issued if the harasser breaches any court order.

The types of activity which could be problematic are:

- long lens photography;
- doorstepping;
- interviewing/speaking to friends, business associates and family about the subject, without the consent of the subject;
- contacting a subject after he/she has refused to comment;
- continuing to film a subject after they have asked for filming to stop.

Clearly, compliance with the provisions of the Code on fairness and privacy would assist in any defence. See Fairness and Privacy Chapters at 4C and 4D respectively.

LEGAL PROTECTION OF CONFIDENTIAL INFORMATION

The law seeks to protect confidential information by preventing those who have obtained confidential information from taking unfair advantage of it e.g. an employee improperly divulging the secrets of his/her employer.

Historically, the courts required that a 'relationship' of confidence existed between the person seeking to disclose information and the person seeking to protect it e.g. employer/employee. However, the relationship of confidence has been greatly expanded and now, as long as the surrounding circumstances denote that the information is confidential, this will suffice for the purposes of seeking the protection of the law.

Often, particularly in current affairs programmes, programme-makers and broadcasters will come by information that is clearly confidential and the question arises

whether or not there is justification to publish that information to a wider audience.

How Confidential Information is Protected

If a broadcaster publishes confidential information without authorisation, then the individual or organisation whose confidence has been betrayed may be able to sue the broadcaster for damages. In addition, if the individual or organisation becomes aware of the intention to divulge the confidential information before broadcast, they will often apply to the Court for an injunction i.e. a temporary order preventing broadcast until the matter can properly be decided at a later trial. Note: a pre-transmission injunction based on the law of confidence is one of the easiest ways for an individual or organisation to stop programmes being broadcast.

It is also important to note that if an injunction is granted, even against some other media organisation, all media organisations who are aware of the injunction will be similarly bound by it, even if they are not named specifically on the Order. To breach an injunction is to commit a contempt, i.e. a criminal offence.

The law of confidence has been widely used to prevent publication of all kinds of confidential information e.g. companies use the law of confidence to prevent their commercial and trade secrets being divulged to competitors; celebrities and royalty have used it to try to prevent former staff from revealing details about their domestic arrangements and private lives; individuals have used the law of confidence to try to prevent details of their sexual relationships being made public; and, governments use it (often in conjunction with Official Secrets legislation) to prevent defence and intelligence staff and, in turn, journalists from divulging protected information which could be damaging to the national interest.

Public Interest Defence

The main defence to any legal action for breach of confidence, or an application for an injunction based on breach of confidence, is that there is an overriding public interest in publication i.e. the media can broadcast/publish confidential material or information providing the public interest in so doing is greater than the public interest in maintaining the confidence.

In resisting any application for an injunction or any action for damages, it would be up to the broadcaster to establish that publication/broadcast was in the public interest e.g. it was necessary to expose crime, corruption, anti-social behaviour or injustice.

Confidential Information Protected by Contract

Confidential information may also be protected by the law of contract e.g. employers may make it a term of their employment contracts that staff are bound not to disclose confidential or private information to third parties which they have come to know as a result of their employment e.g. staff of celebrities or royalty. Whether a court will act to enforce such confidentiality clauses will normally turn on the nature of the confidential information to be disclosed and whether, in all the circumstances, it is in the public interest that the confidentiality clause be enforced or not. In addition, employees or 'whistleblowers' are now further protected under the Public Interest Disclosure Act 1998, where they are dismissed or victimised for making a protected disclosure of information.

Wherever a programme may reveal confidential information, advice must be sought from the programme lawyer at an early stage.

LEGAL PROTECTION OF PERSONAL INFORMATION

Another significant piece of legislation that protects individuals' privacy rights is the Data Protection Act 1998, which regulates how personal information about individuals (not companies) is collected and used.

Personal Information

Personal information or 'personal data' means any information which relates to a living individual (the data subject) who can be identified from that information and which is either 'processed' electronically or, if manual, is held in a structured system e.g. a card index. 'Processed' is carefully defined in the Act but includes virtually any use of the information, including obtaining and simply holding the information.

Personal data would include personal information i.e. addresses, email addresses, telephone numbers etc. that programme-makers and broadcasters collect and handle for whatever reason e.g. when people enter programme competitions or request programme support material. It also includes information that is collected about people for use in programmes e.g. information about contributors, including footage of them, whether or not they have consented to take part [see 'Journalistic Exemption' below].

Data Protection Principles

The Act contains a number of principles that people 'processing' personal data e.g. programme-makers, journalists, editorial staff must comply with and provides even greater protection to 'sensitive personal data' i.e. information which is deemed so sensitive it can only be processed in very narrowly prescribed circumstances e.g. information about an individual's racial or ethnic origins or relating to their sexual life.

In summary, in order to comply with Data Protection legislation, all personal data that broadcasters or programme-makers hold about individuals must be:

- collected and used fairly and lawfully
- processed for limited, lawful purposes
- adequate, relevant and not excessive in relation to the purpose for which it is being processed
- accurate and, where necessary, kept up to date
- not be kept for longer than is necessary for the use for which it was collected
- processed in accordance with the rights of the subject, under the Act
- stored safely and securely
- not be transferred to countries outside of the EU, unless adequate protection is ensured.

Rights of the Data Subject

Individuals have a number of rights in relation to information that organisations hold about them. These include a right to find out whether a particular organisation holds information about them, if so what that information is, the purposes why it is being held, who it is or may be disclosed to and who the source of the information is ("subject access request"). If information held is incorrect, the data subject has the right to have the information corrected and to claim compensation. The data subject is also able to require the organisation holding the personal information to stop processing it on the grounds that it would cause or be likely to cause substantial and unwarranted damage or distress to him or another.

If an organisation is found to have processed information in a way which is incompatible with the Act, the Data Commissioner can serve an enforcement notice requiring compliance. Failure to comply with such a notice is an offence.

Journalistic Exemption

Clearly, without special protection, Data

Protection legislation could have a very damaging effect on the activities of the media so, to protect legitimate activities, the Act contains an exemption for 'journalistic, literary or artistic' purposes.

This states that personal information which is processed only for journalistic (or literary or artistic) purposes is exempt from the following key provisions of the Act, amongst others: the data protection principles as outlined above (except the one requiring the information to be kept secure); subject access requests; and, the subject's right to prevent processing where likely to cause damage, distress. However, the exemption only applies if the processing is done with a view to publication of material which has not previously been published. Once a programme has been broadcast, therefore, programme-makers and broadcasters must comply with the data protection principles and comply with any subject access requests where relevant.

In addition, the journalistic exemption only applies if the broadcaster reasonably believes that publication would be in the public interest and that, in all the circumstances, to comply with the rules of the 1998 Act would be incompatible with journalistic purposes.

If programme-makers receive any subject access requests from individuals or their legal advisors, particularly in relation to programmes that have not been broadcast, programme-makers must alert their commissioning editor and programme lawyer immediately.

FAQs

Q. A potential contributor has signed a confidentiality agreement. Can we even talk to them? The contributor has asked for an indemnity against any breach of their agreement. Can we give one?

A. As part of their research, programme-makers and journalists can speak with and interview potential contributors, who have signed a confidentiality agreement, as is often the case with current or former employees. Any such confidentiality agreement binds the individual who has signed it; there is no legal liability for the programme-maker who simply receives the information. However, if the programme-makers and broadcaster wish to broadcast that information, there are a number of questions which need to be asked and decisions made.

Firstly, it is important to be clear about the exact terms of the confidentiality agreement and what information it covers. If possible, try to obtain a copy of the agreement. Secondly, a decision needs to be taken as to what parts of the information supplied by the contributor are likely to be covered by the confidentiality agreement. Note: not everything which the confidentiality clause seeks to cover may actually be confidential information. Finally, once it is clear what information is covered, a decision will be taken as to whether publication/broadcast of that information is justified e.g. by the public interest. Note: regardless of whether there is an express confidentiality clause, there is an implied term in employment contracts that employees and former employees owe a duty not to disclose the confidential information of their employers.

In practical terms, as soon as it is known or suspected that a potential contributor or source is the subject of a confidentiality agreement, sometimes called a 'gagging clause', this must be referred to the programme lawyer for advice.

Sometimes a contributor will ask for an indemnity i.e. they will want a written, contractual assurance that if they are sued for breaching the terms of the confidentiality agreement which they have signed, the production company and/or broadcaster will cover all their legal costs and any potential damages they may have to pay – which might include a loss of pension rights. Such an assurance should never be given or even suggested by a programme-maker before referring the matter to the programme lawyer for advice. In most cases, there will be very good reasons for not giving an indemnity.

Furthermore, no payment should be made or promised to a source or contributor who may be providing confidential information, before seeking advice from the programme lawyer.

Q. The information is protected by a confidentiality agreement but it was revealed to us by a third party, who is not a party to the agreement. Can we go ahead and broadcast it?

A. Assuming that the information really is confidential, a third party e.g. a broadcaster, who is in receipt of that information, which it is known or suspected is subject to a duty of confidence, may also be prevented from broadcasting that information under the law of confidence.

For example, say a government minister was in serious personal debt and had defaulted on his mortgage payments. His private secretary (who has signed a confidentiality agreement) is aware of this and has documents in his possession which prove this. The private secretary's wife, who has not signed any confidentiality agreement, comes across the memoranda and decides to pass these on to a current affairs television journalist, without telling her husband. Can the information and the documents be broadcast? The answer is that the information is almost certainly confidential (and personal, private information) and both the wife of the private secretary and the journalist/broadcaster would know or suspect that it was.

If/when the government minister discovered the information was to be broadcast he/she would be entitled to use the law of confidence in order to try to restrain broadcast by an injunction and/or, following broadcast, to seek damages. Whether or not that legal action would be successful would depend on whether, in all the circumstances, the court decided that broadcast of the confidential information was in the public interest or not.

As above, wherever it is intended to broadcast information which might be confidential and/or the subject of a confidentiality agreement, please refer to the legal and compliance department for advice.

Q. The subject of an investigation is demanding to see all our rushes on the basis of data protection law. What we should do?

A. In short, refer the request to the programme lawyer immediately. Prior to broadcast of the programme, any request to see rushes is very unlikely to be granted since the material is likely to fall squarely within the 'journalistic exemption'. Following transmission of the programme, whether or not any such request would be granted would depend on the particular circumstances of the case.

5D. COPYRIGHT AND FAIR DEALING

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KEY POINTS

- Programme-makers have contractual responsibility for ensuring that all necessary clearances e.g. copyright, trademarks etc. have been obtained for their programmes.
- Copyright queries. In the event of a copyright clearance query, programme-makers and producers should contact their allocated commercial or business affairs executive in the first instance, unless it relates to fair dealing or issues of potential infringement, in which case programme-makers should contact the programme lawyer.
- Clearance. Where appropriate, programme-makers must obtain the consent of the copyright owner, normally in the form of a signed licence agreement. If programme-makers encounter problems clearing footage or other material, or consent by the copyright owner is denied, programme-makers must ensure the material in question is removed from the programme or, otherwise, must alert the programme lawyer, who will decide whether or not it can be used pursuant to one of the statutory defences that exist e.g. “incidental inclusion” or “fair dealing”.
- ‘Fair dealing’ is a defence to copyright infringement which allows works that are otherwise protected by the law of copyright, to be used within programmes, in certain circumstances, without being licensed. Where there is any wish or intention to ‘fair deal’, programme-makers must seek the consent and advice of the programme lawyer. Note: most sports footage cannot be fair dealt and can only be used in accordance with the provisions of the Sports Access Code, to which Channel 4 and Five (and ITN and Sky, who make Channel 4’s and Five’s news respectively) are signatories.
- For general enquiries regarding music clearance matters, please refer to the ‘commercial affairs – rights’ department at Channel 4 or the ‘music services’ department at Five.

COPYRIGHT

The legal and compliance departments at Channel 4 and Five do not advise on general, day to day, copyright clearance matters unless the query relates to one of the statutory defences to copyright infringement, e.g. fair dealing.

Programme-makers and production companies have contractual responsibility for ensuring that all necessary clearances e.g. copyright, trademarks etc. have been obtained for their programmes.

In the event of a copyright clearance query, programme-makers and producers should contact their allocated commercial or business affairs executive in the first instance.

For reference, below is a brief synopsis of the law of copyright and ‘fair dealing’. For detailed advice regarding fair dealing see ‘Fair Dealing Guidelines’ at Appendix 7E.

What is copyright?

The law of copyright exists to protect people’s creative endeavours so that they can properly benefit from their work. If such protection didn’t exist and people were able to copy or sell or profit from another’s work, there would be little incentive for people to create in the first place.

Copyright is the name for a collection of exclusive rights to do certain acts in respect of certain types of creative works. Virtually all creative works are protected, including: literary works (e.g. novels, newspaper articles, factual books, letters, computer programmes); all kinds of musical works; dramatic works (e.g. stage plays, dance); artistic works (e.g. paintings, photographs, sculpture); sound recordings (e.g. CDs, tapes); all types of films; broadcasts (there is separate copyright in a broadcast, in addition to any copyright in the creative content); cable programmes; and,

published editions (the layout of a book or magazine). Copyright extends to almost any work, the creation of which took some endeavour. Copyright protects the form of the creative work, not the idea itself. There is no copyright in an idea (although an idea may be protected by the law of confidence – see Confidence at Chapter 5C); it must be in tangible form e.g. in writing or some other permanent form.

The copyright owner has the exclusive right to do and authorise others to do the following:

- copy the work, issue copies of the work to the public;
- perform, show or play the work in public;
- broadcast it or include it in a cable programme service;
- rent or lend copies of it; and
- make an adaptation of it or do any of the above in relation to an adaptation;

How Long does Copyright Last?

Copyright protection does not last indefinitely but it does last a long time e.g. in the case of a novel or a play, 70 years from the end of the calendar year in which the author dies. Most creative works, therefore, are protected and their use will be restricted by the laws of copyright.

Who Owns Copyright?

Generally, the first owner of copyright is the author of the work unless he/she has created the work as part of his/her employment, in which case the first owner of copyright will be the employer, which may be an individual or a company. In the case of a film, television programme or sound recording the first owner of copyright is generally deemed to be the person or entity that made the arrangements for the making of the film or recording. This is usually the producer or production company although may be the commissioning broadcaster.

Whenever programme-makers are including the creative works of others in programmes, they must obtain the consent of the copyright owner. Such consent should normally be in the form of a signed licence agreement which sets out the exact terms upon which the material in question can be used.

Infringement

If the creative works of others are included in programmes without the proper consent having been given, there is likely to have been an infringement of copyright. This is a serious matter and may lead to programme-makers and the broadcaster being sued by the copyright owner. They could sue for damages (i.e. money); an account of profits (i.e. any profits arising from the infringement); an injunction (i.e. a court order prohibiting the continued infringement of copyright); and, delivery up (i.e. a court order forcing delivery up of all copies of the infringing work to the copyright owner).

It is very important, therefore, that all material for inclusion in programmes is properly cleared or licensed. Where programme-makers are having problems clearing footage or other material, or consent by the copyright owner has been denied, programme-makers must ensure the material in question is removed from the programme or, otherwise, must alert the programme lawyer, who will decide whether or not it can be used pursuant to one of the statutory defences that exist e.g. "incidental inclusion", "fair dealing".

Incidental Inclusion

Copyright is not infringed by the "incidental inclusion" of a copyright work in a film or sound recording. However, what is "incidental" is open to interpretation and argument and, certainly, if a work has been deliberately incorporated into a programme, it is likely to be difficult to argue that its inclusion is incidental. Note: in the case of musical works specifically, if

the work has been deliberately included, then the Act states that inclusion of the work should not be regarded as incidental.

The 'incidental inclusion' exception is likely to be helpful in situations where, for example, there is a fleeting or partial glimpse of some copyright work e.g. a snippet of a programme on a television screen in the background of shot; a quick camera pan across a poster on a wall or a bill board on the street; a brief or partial shot of a magazine cover, for example in a doctors waiting room where filming is taking place; or where there is some background music playing where you are filming e.g. in a lift or shop (and it has not been deliberately included e.g. added in the edit). Note: 'incidental inclusion' is UK defence to copyright infringement. Thus where international sales of a programme are anticipated, consideration should be given as to whether works deemed incidental for UK transmission, need to be cleared for foreign jurisdictions.

If in doubt about whether the inclusion of a copyright work needs to be cleared, programme-makers should seek advice. In accordance with the general terms of Channel 4's and Five's production agreements, it is the responsibility of the producer to ensure that all necessary clearances have been obtained.

Fair Dealing

Fair dealing is a statutory defence (the statute being the Copyright Designs and Patents Act 1988) to copyright infringement which, from the point of view of programme-makers and broadcasters, can be very useful because it allows works (e.g. musical, literary, artistic works, clips from other television programmes and films) that are otherwise protected by the law of copyright, to be used within programmes, in certain prescribed circumstances, without being licensed i.e. without consent from the

copyright owner, without payment being made and even where consent has been sought but the copyright owner has specifically refused permission for the work to be used. Clearly fair dealing will be helpful in those circumstances where programme-makers wish to review critically a copyright work e.g. a film, book or another television programme, and the author or copyright owner refuses. Note: fair dealing is a defence to copyright infringement in the UK and whilst some other countries do have similar defences, they are not the same. If international sales are anticipated for a programme, therefore, fair dealing is unlikely to be suitable unless the intention is to seek specific legal advice on the law in each country to which the programme is intended to be distributed.

Where there is any intention to 'fair deal' material, programme-makers must seek the consent and advice of the programme lawyer.

For a detailed, practical explanation of the law of fair dealing, please see the Fair Dealing Guidelines, at Appendix 7E.

The Sports Access Code

Shortly after the fair dealing provisions of the Copyright Designs and Patents Act 1988 came into force and following legal proceedings between the BBC and Sky, broadcasters and large independent production companies agreed a code of conduct in relation to the use of each others' sports footage. This agreement was named the "Sports Access Code" and Channel 4 and Five are both signatories. This means that most sports footage cannot be fair dealt and can only be used in accordance with the provisions of the Sport Access Code. For detailed advice regarding the Sports Access Code, please refer to the legal and compliance department for advice.

Music Clearances

For general enquiries regarding music clearance matters, please refer to the commercial affairs – rights department at Channel 4 or the music services department at Five.

FAQs

Q. There's a poster in shot. Do we need to clear it?

A. This depends on a number of factors, such as how prominently it appears, whether its inclusion is deliberate or whether it's merely incidental. For example, a fleeting glimpse of a poster or picture on a wall in a documentary is unlikely to require clearance, as its inclusion could be defended as being "incidental" (see 'Incidental Inclusion' above). However, if the poster was deliberately included within a programme e.g. within a drama set, or was shown prominently e.g. the poster was picked out and commented upon, then it is unlikely its inclusion could be classed as 'incidental' and clearance from the copyright owner would be likely to be necessary.

Note: programme-makers take sole responsibility for ensuring that all necessary copyright clearances are sought prior to broadcast. If in doubt about whether the inclusion of a particular copyright work falls within one of the statutory defences e.g. 'incidental inclusion' or 'fair dealing', please seek advice from the programme lawyer.

Q. When we show newspaper articles briefly, do we need to clear them?

A. Newspapers, which consist of written articles and photographs, are copyright works and, as such, need to be licensed if they are to be included within programmes, unless their use falls within one of the statutory defences e.g. 'incidental inclusion', 'fair dealing'.

Thus, in most types of programmes, if newspaper articles or pages from newspapers are shown e.g. 'rostrummed', held up to camera, they will need to be licensed in the usual way.

However, in some types of programmes, in particular topical, review or news-type programmes, showing pages or articles from newspapers may well fall within fair dealing provisions (potentially both in order to report a current event and as part of a review/critique) and, if that is the case, clearance will not be required.

However, whenever it is intended to include newspapers or articles from within newspapers in this way, without clearance from the copyright owner, particularly where photographs form part of the page or article, advice must be sought from the programme lawyer.

Q. Do newspaper headlines need to be cleared?

A. Often programme-makers wish to include newspaper headlines within their programmes, either taken directly from the page of the newspaper in which they originally appeared, or reproduced as a graphic. The question frequently arises whether the use of such headlines requires clearance from the newspaper's publisher. Recent case law suggests that the courts would be unwilling to find the reproduction of a simple headline amounted to copyright infringement of the article or publication from which it came (as it would not amount to a 'substantial part') but as with all rights clearance issues this is primarily a matter for the producers, who should decide whether clearance is necessary based on the nature of the programme and the intended use. In certain circumstances clearance may well be advisable; in others, it may be wholly unnecessary.

Q. What's the difference between "fair dealing" and "fair comment"?

A. Sometimes programme-makers confuse 'fair dealing' with 'fair comment'. Whilst they are both terms which denote a defence in law, they are entirely different. Fair comment is a defence to an action for defamation i.e. libel or slander, and protects honestly held opinion (not statements of fact), based on true facts, expressed on matters of public interest. Fair dealing, on the other hand, has nothing to do with defamation. It is a defence to copyright infringement, where a copyright work is being used either in order to review or critique it or another work, or is being used in order to report a current event (and in both cases, a sufficient acknowledgement of 'title and author' is given). See [Defamation at Chapter 5A](#); see [Fair Dealing, Copyright at Chapter 5D](#).

Q. Is "fair dealing" the same as "news and review"?

A. Yes. For some reason, some producers refer to fair dealing as "news and review". However, this is discouraged, as it can lead producers to confuse the two distinct limbs of fair dealing i.e. 'review or critique' and 'reporting current events'. From time to time, when fair dealing a copyright work, it may be being used both in order to review or critique either it or another work and in order to report a current event, but in most cases it will only be being used for one purpose.

Q. We are fair dealing a movie clip but do we have to clear the music within it?

A. No. If a film clip is being fair dealt (properly of course), underlying rights such as a music score within it, would not need to be separately cleared. If this wasn't the case and underlying rights had to be cleared, it would make fair dealing practically impossible and frustrate the very purpose for which it was introduced.

Q. Can you still fair deal if the copyright owner has actually refused permission to use the clip?

A. Yes. It does not matter if the copyright owner has refused permission, as long as the particular copyright work is being properly fair dealt.

Q. Does the copyright owner have to refuse permission before we can fair deal?

A. No. It makes no difference. In fact you don't even need to contact the copyright owner for permission in the first place, or even alert the copyright owner to the fact that you are intending using their copyright work. You should seek advice before contacting a copyright owner where you believe you may wish to fair deal a copyright work.

Q. When you're fair dealing a clip, you're covered if you say 3 things about it. Correct?

A. Not necessarily. Some producers' understanding of fair dealing appears to be that if three review points are made about a particular clip (along with an acknowledgement) then the fair dealing provisions will be satisfied. This has no basis in law whatsoever. Advice should be sought on a case by case basis from the programme lawyer for advice as to what amount or degree of review or analysis is required.

Q. Why can't sports footage be fair dealt in the normal way?

A. Channel 4 and Five (and ITN which makes Channel 4 News and Sky which produces Five's news), along with almost all other mainstream UK broadcasters are signatories to the Sports Access Code, an agreement whereby producers of sports material, news organisations and broadcasters have agreed, when fair dealing, only to use each others' sports footage in clearly defined ways. Whenever it is intended to fair deal sports material, it is essential programme-makers take advice from their relevant programme lawyer.

Q. Isn't material on websites "public domain", so it doesn't need to be cleared?

A. This is a common misconception. Content i.e. articles, pictures, music, graphics, photographs etc. to be found on the internet is just as much protected by copyright law as any other copyright material. Just because it can be seen, accessed or downloaded on the internet does not mean that it is free to use, copy or distribute unless of course the copyright owner explicitly states that it can be e.g. a small amount of material that can be accessed via the internet is 'public domain' and free to use but where it is, it will be clearly spelled out in a licence agreement accompanying the material in question. Other copyright material found on the internet may be free to use but only in certain defined ways e.g. material posted onto the internet under a Creative Commons Licence. If in any doubt at all whether clearance is necessary, programme-makers should err on the side of caution and contact the copyright owner for consent unless the intention is to fair deal the material, in which case programme-makers should seek advice from the programme lawyer.

5E. OTHER LAWS AFFECTING BROADCASTING

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166	Section 10 Contempt of Court Act 1981
166	Police Enquiries
166	Police Search Powers & Journalistic Material
167	Terrorism
167	Official Secrets Act
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168	Obscene Publications Act
168	Protection of Children Act
168	Child Performance Licences
169	Election Reporting
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OTHER LAWS AFFECTING BROADCASTING

PROTECTION OF SOURCES

Although Section 7 of the NUJ Code states that “A journalist shall protect confidential sources of information”, the law does not give an unqualified right to journalists not to divulge sources, as it does to lawyers regarding their client’s affairs. The Divisional Court’s ruling in a 1992 case concerning Prevention of Terrorism legislation was that journalists should not give unqualified undertakings to their sources that they will never disclose their identity but should (and properly only could) pledge not to disclose unless ordered to do so by a court. To do otherwise would be to pledge to commit a contempt i.e. commit a criminal offence.

SECTION 10 CONTEMPT OF COURT ACT 1981

Section 10 provides some protection for journalists and their sources. It states that no court shall require anyone to disclose a source of information unless necessary in the interests of justice, national security or the prevention of disorder or crime. Whether any particular circumstances warrant disclosure is ultimately for the court to decide, taking into consideration the Human Rights Act 1998 and, in particular, the right to freedom of expression. The courts have held that disclosure orders should be made only in exceptional circumstances and where disclosure is justified by an overriding public interest.

If any undertaking is given to a source by a programme-maker, once it appears that such an undertaking may also become binding on the broadcaster, programme-makers must immediately notify the commissioning editor who will consult with the programme lawyer and, if

necessary, refer the matter up in accordance with Channel 4’s or Five’s internal compliance procedures. Where there is the possibility that any undertaking may conflict with the law e.g. an unqualified undertaking of anonymity has been given to a source by a journalist, this must be referred up to the relevant broadcaster’s most senior editorial executive who may refer the matter to the board of directors. Generally, programme makers and journalists should not make such unqualified undertakings before consulting and seeking the approval of the broadcaster.

POLICE ENQUIRIES

Whilst there can be a legal obligation to answer questions properly asked by a court of law, there is no legal duty to provide information to the police for their inquiries, save in exceptional circumstances e.g. if the matter relates to a breach of section 1 of the Official Secrets Act 1911 regarding national security, or relates to terrorist offences. See “Terrorism” below. However, programme-makers must never be dishonest or attempt to mislead the police in their enquiries, as this may constitute an attempt to pervert the course of justice, a criminal offence.

POLICE SEARCH POWERS & JOURNALISTIC MATERIAL

Journalistic material, which includes television programmes/unbroadcast rushes, is given special protection from seizure by the police. If the police want to seize such material, they must apply to a judge. Normally, the holders of the material e.g. the broadcaster/programme-makers are entitled to make representations to the judge and argue against disclosure if they so wish.

Before a judge will order material to be handed over to the police, he/she must be satisfied that there are reasonable grounds for believing that a serious criminal offence has been committed, that the evidence

would be admissible at trial and would be of substantial value and that disclosure would be in the public interest. In practice, however, the courts usually order the broadcaster and journalists to disclose such material whenever the police make an application.

To refuse to comply with a court order to disclose documents will be in contempt of court even though to do so may reveal an anonymous source. The court may in any event order the naming of the source.

In Scotland the Police and Criminal Evidence Act (PACE) does not apply but if police seek a warrant for recovery of journalistic material there is now a convention that notice would be given to journalists or broadcasters so that representations could be made to the Court .

Any enquiry or approach from the police or authorities in relation to programme-making activities must be referred immediately to the commissioning editor and programme lawyer.

TERRORISM

The Terrorism Act 2000 (as amended by the Anti-terrorism, Crime and Security Act 2001) places a positive duty to disclose information relating to terrorist offences. A serious offence is committed (carrying a penalty of up to 5 years’ imprisonment if tried in the Crown Court) if a person, without reasonable excuse, fails to disclose information that he knows or believes might be of material assistance in preventing the commission, by another person, of an act of terrorism, or in securing the apprehension, prosecution or conviction of another person in the UK for an offence involving the commission, preparation or instigation of an act of terrorism.

In addition, it is also an offence if a person fails to inform the police where he/she believes or suspects that certain offences

relating to the funding of suspected terrorists have been committed.

The Prevention of Terrorism Act 2006 has introduced a new offence commonly referred to as the ‘glorification of terrorism’ offence. The offence is committed by the publication of statements that glorify the commission or preparation of acts of terrorism (whether in the past or in the future). The offence is committed if members of the public could reasonably expect to infer that what was being glorified should be emulated by them. On conviction, the offence carries a penalty of up to 7 years imprisonment and/or a fine if tried in the Crown Court.

These provisions may well catch journalists making programmes on terrorism, especially undercover operations. For this reason: **any programmes dealing with or touching upon terrorist activity must be referred to the programme lawyer at a very early stage and, where possible, even before research begins. Programme-makers must not conduct interviews with known or suspected terrorists before having taken detailed legal advice.**

OFFICIAL SECRETS ACT

The Official Secrets Act 1989 makes it a criminal offence to obtain or publish any information from a serving or former member of the security and intelligence services or from certain categories of civil servants or public contractors where that disclosure would be damaging. There is no public interest defence. If it is anticipated that a project will stray into this complex area of law, referral to your commissioning editor and programme lawyer should be made immediately.

TELEPHONE TAPPING, EAVESDROPPING & INTERCEPTION OF MAIL

Unauthorised eavesdropping on radio

communication or use of transmitter bugs and/or the disclosure of information acquired in this way is a criminal offence – the Wireless Telegraphy Act 1949. In addition, the Regulation of Investigatory Powers Act 2000 makes it a criminal offence to intentionally and unlawfully intercept communications by post, phone or other telecommunications systems. These laws do not affect journalists recording telephone conversations to which they are a party either for research purposes or with a view to broadcast – but see regulatory provisions regarding privacy considerations at Chapter 4D, Privacy.

OBSCENE PUBLICATIONS ACT 1959

The Obscene Publications Act 1959 applies to television and covers material which is obscene, whether it is in a person's possession or it is published or broadcast. The definition of obscene is "*likely to deprave and corrupt*" the audience for which it is intended and includes not only sexually explicit material but material relating to violence and drug taking. This offence is more likely to apply to research material than material actually transmitted because of the stricter tests relating to harm and offence under the Communications Act 2003 and the Ofcom Broadcasting Code.

PROTECTION OF CHILDREN 1978

The Protection of Children Act 1978 makes it a criminal offence to take or show an indecent photograph (which includes filming for television) of a minor under the age of 18 and even to involve a minor in a photograph or television image that is itself indecent, even where the child's role in it is not central i.e. to broadcast an image where a child's picture had been superimposed onto a pornographic image would be an offence. This also means that in drama, any actors that are required to be filmed in scenes of an explicit sexual

nature must be aged at least 18, regardless of the age of the character they are playing.

CHILD PERFORMANCE LICENCES

The law states that children under the compulsory school age (16) must not take part in any "performance", including a "broadcast performance", except under the authority of a licence granted by the local authority in which the child resides. However, there are some exceptions: for example, a licence is not required where no payment is made (to the child or another person) in respect of the child taking part in the performance (expenses can be paid) and where, within the six months preceding the performance, the child has not taken part in other qualifying performances on more than three days.

Unfortunately, there is no accepted definition of what constitutes a "performance". Standard broadcasting industry practice is to treat traditional performance-type activities e.g. singing, dancing and acting as amounting to a performance under the legislation but that general filming e.g. in factual and documentary programming, is not caught by the legislation.

Judging whether a child performance licence is necessary in a particular case is rarely straightforward and is not helped by the fact that each local authority tends to have its own interpretation of the law.

Accordingly, wherever young people of school age are to be featured prominently within programmes or, indeed, it is felt that the child's contribution might amount to a performance, even where the contribution is insubstantial, programme-makers must seek advice from the programme lawyer.

Note: young people are deemed to be of compulsory school age until the last Friday in June in the school year in which they

have reached the age of 16. Thus, a young person may be 16 years old but still require a licence to perform.

ELECTION REPORTING

It is an offence to make a false statement of fact in relation to the personal character of a candidate after an election has been called and it is also an offence to publish or broadcast falsely that a candidate has withdrawn from the election in order to promote another candidate. Detailed advice will be sent to editorial staff and relevant programme-makers at the time of elections. For regulatory Code requirements for Election reporting see Chapter 4G, Elections.

COMPETITIONS & LOTTERIES

There are detailed statutory provisions which relate to competitions. Early advice from the legal and compliance department should be sought if there is any intention to include a competition within a programme to ensure its legality and compliance with the Code. See also Code requirements for Competitions at Chapter 4H, Commercial References and Sponsorship.

5F. PROGRAMMES INVOLVING CRIMINAL ACTIVITY

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PROGRAMMES INVOLVING CRIMINAL ACTIVITY

[see Chapter 4B, Crime and Chapter 6F, Checklist for Programmes Involving and/or Concerning Crime]

Filming with Criminals

Programme-makers should proceed with extreme care when filming with criminals or when filming criminal activity generally and should always seek legal advice before filming takes place, unless particularly experienced in this area of filmmaking.

People may be willing to be filmed talking about crimes they have committed. Whilst this in itself is not problematic and programme-makers will not have committed any offence by simply receiving the information [but see 'Terrorism' at Chapter 5E above], there are a number of things to consider.

Firstly, the person admitting the criminal behaviour could be prosecuted after transmission and the film, including rushes, could be obtained by the police by a court order and used as evidence (see 'Journalistic Material' above at Chapter 5E).

Programme-makers should ask themselves why the person is willing to talk on camera about their criminal activity. Do they understand the potential consequences? Are they simply boasting/ do they have any reason to lie? Even if what the self-confessed criminal is saying is true, are they likely to deny it later anyway? Programme-makers should consider what possible effect this could have on the programme and generally.

Assisting Criminal Activity

Care is needed when actually filming criminal activity. It is an offence to aid, abet or assist the commission of any criminal offence i.e. assisting any criminal activity is likely to amount to a criminal offence

itself. What constitutes 'assisting' is often less than people think. Something as seemingly innocent as giving a criminal a lift in a car might in certain circumstances be deemed to be assisting the commission of a criminal offence.

Whenever filming criminal activity, programme-makers must always remember to remain as passive observers and do nothing that could be deemed as encouraging, inciting or assisting criminal activity.

Here are some basic rules programme-makers should always follow:

- be scrupulous to avoid a charge of encouraging or inciting or aiding or abetting any criminal behaviour. Bear in mind that those being filmed may later allege this. It is important that the rushes refute any such allegations, providing potentially crucial evidence that you didn't overstep the mark;
- make a careful distinction between observation and participation and keep any criminal behaviour at arms length ;
- never provoke behaviour which would not otherwise have occurred;
- think carefully before making any payment to a criminal – is payment in the public interest? For regulatory provisions regarding payments to criminals see Chapter 4B. In addition, any payment to a criminal is likely to need approval from the broadcaster.

Note: when filming with criminals and the issue of payment arises and there is arguably a public interest in making such a payment, this should be referred back to the broadcaster for discussion and approval. In exceptional circumstances this may not be possible or practical, in which case the most senior editorial person present should make the decision whether or not to make the payment. This must be referred to the broadcaster

Example

You are making a film about disaffected youth in a rundown suburb of a northern city and you are filming with a group of young people that live on an estate. One teenager admits on camera that he sells drugs.

He offers to sell you some cannabis and also invites you to film him selling drugs to others. He says there's a pub on the other side of town where he regularly sells. However, he doesn't have transport so says that if you want to film him, you'll have to give him a lift in your car. He also says he's hard up so would need paying £50 to cover his time. He asks if he can have the money up front now as he is meeting his supplier in half an hour and he's £50 short of cash for his next supply. What do you do?

First, ask yourself: is he telling the truth? Why would he lie? Does he fully understand that what he is saying is being recorded and is likely to be seen by others? What might be the consequences for him and you? He's offered to let you film him actually doing drug deals? Why is he letting you do this? Also, think about your safety. Are you on your own? What danger might you be putting yourself in?

He's offered to sell you cannabis. Obviously, if you accept, you will be in possession of a controlled substance and will be committing a criminal offence, so refuse (unless of course this is an undercover investigation, the very purpose of which is to reveal him selling drugs – in which case see below).

as soon as reasonably practicable.

Programme-Makers Undertaking Activities which may Amount to an Offence

When filming any criminal activity, there is always a risk that programme makers may get arrested, particularly if there is confusion

He asks you for a lift to a place where he can sell drugs. He hadn't intended going there today but is willing to do so, so you can film him. In such circumstances, the contributor is doing something that he would not otherwise have done, had it not been for your intervention and, by giving him a lift, you may be assisting the commission of a criminal offence i.e. taking him to a place for the specific purpose of selling illegal drugs. Decline to give him a lift.

If, after careful thought, you decide that it is important to film such a scene and that it's safe to do so, you could agree to film him selling drugs but only when he would be doing it in any event. He could tell you of a suitable opportunity to film him. In these circumstances, you are not causing something to happen that wouldn't have otherwise, you are merely there observing.

Finally, he's asked you for £50. Not only is paying him likely to breach regulatory rules (see Chapter 4B, Crime), because there is unlikely to be a public interest in making such a payment, but also think about how the payment might be perceived by others e.g. the police. What if the contributor is later arrested and the police quiz you about your involvement. The truth would be that you had paid this person £50, knowing that the money was to be used to buy drugs. Again, this may be seen as assisting the commission of a criminal offence. In short, decline to make any payment.

about the programme-maker's role and whether they may be involved in the particular criminal activity. To minimise this risk, there are rules of best practice that programme-makers should follow - see above and 'Programmes Involving and/or Concerning Crime' Checklist at Chapter 6F.

However, from time to time programme-makers may deliberately undertake activities which put them at real risk of being arrested and charged with a criminal offence e.g. in undercover operations, where an undercover journalist comes into possession of drugs or stolen property for the very purpose of exposing the illegal activity. Such programmes require very careful consideration, research and preparation and must not be undertaken before detailed legal advice has been sought.

Programmes involving criminal activity may also touch upon issues related to contempt and court reporting. See 'Contempt and Reporting Legal Proceedings' at Chapter 5B.

FAQs

[see also FAQs at Chapter 4B, Crime]

Q. The police have asked to see our rushes. What shall we do?

A. Television programmes and rushes are deemed to be 'journalistic material' and, as such, are given special protection in law from seizure by the police. If the police want to obtain such material, they must apply to a judge. If the police ask for your footage, politely inform them that the footage is journalistic material and the property of Channel 4 or Five (or whichever company owns it) and that they must put their request in writing to the legal and compliance department at the relevant broadcaster. At the first available opportunity, you should make contact with your programme lawyer or another lawyer in the legal and compliance department to inform them what has happened and for advice on how best to proceed.

Q. The police want to interview me. Do I have to answer their questions?

A. Whilst there is no legal duty to provide information to the police for their inquiries save in exceptional circumstances (if it relates to a breach of section 1 of the Official Secrets Act 1911 regarding national security, or it relates to terrorist offences), you must never be dishonest or attempt to mislead the police in their enquiries, as this may constitute an attempt to pervert the course of justice – a criminal offence. If you are approached by the police in relation to any programme-making activities, contact the programme lawyer (or another lawyer in the legal and compliance department) immediately.

Q. A source wants a guarantee of anonymity. Can I give it?

A. Wherever possible, this should be agreed by the broadcaster in advance. However, where an undertaking has been given to a source by a programme-maker, once it appears that such an undertaking may also become binding on the broadcaster, programme-makers must immediately notify their commissioning editor, who will consult with the programme lawyer and, if necessary, refer the matter up editorially. Where there is the possibility that any undertaking may conflict with the law e.g. an unqualified undertaking of anonymity has been given to a source by a journalist, this must be referred up to the relevant broadcaster's most senior editorial executive who may refer the matter to the board of directors. Generally, programme makers and journalists should not make such unqualified undertakings before contacting and seeking the approval of the broadcaster.

5G. THE INTERNET

THE INTERNET

The Internet as a research tool

The internet is a very valuable research tool and contains an enormous amount of information. However, just because facts and information appear on the internet does not mean that they are true or accurate. Some sites will be more reliable than others e.g. the sites of major broadcasters or national newspapers are likely to be more reliable and accurate than, for example, obscure fanzine sites. Wherever the internet is being used as a research tool, common sense is required and any facts/information gleaned from it needs to be properly evaluated and, where appropriate, corroborated before being included within programmes.

Copyright and the Internet

There is a common misconception that if copyright works e.g. words, pictures, videos, photographs etc. are on the internet, they are somehow in the “public domain” and that normal copyright laws do not apply. This is incorrect. Material appearing on the internet is still protected by copyright. Thus, the material would either need to be cleared i.e. licensed, or advice obtained from a programme lawyer on fair dealing the content in question.

Publishing/Broadcasting on the Internet

Channel 4 and Five have websites which contain information about the channels’ activities generally and about specific programmes and also include actual programmes or cut down versions of programmes that can be watched or downloaded, including from time to time live streaming.

Whilst Ofcom does not at present directly regulate internet content, Channel 4 and Five have internal legal and compliance checks in place to ensure content online it is suitable for users. Unlike broadcast on television, the internet does not have a

watershed. For this reason, as responsible broadcasters, Channel 4 and Five place warnings in front of adult content to ensure that users are fully aware of the nature of the content, which may be unsuitable for children or cause harm and offence.

In terms of the law, there is little difference between publishing/broadcasting on television and on the internet. The laws of copyright, defamation, confidence, privacy etc. all apply and, in fact, in some areas there is a need to be even more careful e.g. because of the fact that sites on the internet can be accessed from all over the world (unless content is geo-blocked).

User-Generated Content and Social Networking Services.

User-generated content (“UGC”) and social networking services are becoming an increasingly important and prevalent part of website publishing. As publishers of the content appearing on their websites, Channel 4 and Five are legally and editorially responsible for such material. The risks associated with its publication are assessed on an individual project basis, and the appropriate level of ‘moderation’, whether pre or post moderation, must be determined in liaison with and agreed by the channels’ programme lawyers.

Video on Demand (“VOD”)

Many Channel 4 and Five programmes are available in on demand services on digital TV services and online.

These services are subject to the same legal restraints as apply to broadcast programmes and material published on the websites operated by Channel 4 and Five.

Channel 4 and Five are also members of the regulatory body ATVOD and all their VoD services, however delivered, must comply with ATVOD’s Code of Practice. The ATVOD Code requires adherence with the Ofcom Broadcasting Code.

In particular, it ensures that appropriate information is provided to prospective users of its service and that there are appropriate safeguards in place for the protection of under 18s.

Mobile Content

Channel 4 publishes programme content on mobile platforms which is editorially overseen by Channel 4’s Video and Mobile Editor. Channel 4’s mobile content is edited to ensure compliance with the Code of Practice of the Independent Mobile Classification Body (the “IMCB”).

Any content commissioned for publication on mobile platforms by Five should be referred to the programme lawyer for advice where appropriate.



PROGRAMMING CHECKLISTS

6A. FACTUAL AND CURRENT AFFAIRS PROGRAMMING

The following is a checklist of regulatory and legal issues and best practice that may arise in factual and current affairs programming, with suggested further reading which gives a more detailed description and explanation of the issues. This document is not intended to be a substitute for seeking appropriate legal advice.

OFCOM BROADCASTING CODE

TRUTH & ACCURACY

● Channel 4 and Five take the issue of viewer trust very seriously. Viewers are entitled to expect that programmes are accurate and true and the audience must not be misled. This obligation applies to all types of programming, including entertainment programmes with factual elements. Portraying real events, whether in documentary, features, factual entertainment, drama or any other programme, which the viewer is entitled to take at face value, must respect truth and accuracy. **Programmes must be honest, fair and accurate and must not mislead viewers.**

- See Chapter 4A, *Protecting Under 18s & Harm and Offence – ‘Viewer Trust: Truth, Accuracy and the Importance of not Misleading the Audience’*
- See Channel 4’s *Viewer Trust Guidelines at Appendix 7A*
- See Five’s *Viewer Trust Guidelines at Appendix 8A*

RECONSTRUCTIONS

- All reconstructions must be fair and accurate.
- If there is a risk that viewers might be misled, reconstructions should be labelled as such to avoid confusion.
- Where there is risk of causing distress

by reconstructing actual events, appropriate parties should be informed.

- See Chapter 4A, *Protecting Under 18s & Harm and Offence – ‘Viewer Trust: Truth, Accuracy and the Importance of not Misleading the Audience’*
- See Channel 4’s *Viewer Trust Guidelines at Appendix 7A*
- See Five’s *Viewer Trust Guidelines at Appendix 8A*

SECRET FILMING

- Individuals must not normally be filmed or recorded secretly for inclusion in a programme unless approved by the broadcaster in advance.
- Programme-makers must set out in writing their justification for covert filming/ recording. It must satisfy the provisions of Section 8.13 of the Code.
- Before any secret filming is undertaken, there are detailed guidelines you must follow. See Channel 4’s and Five’s internal compliance procedures and rules contained within the Appendices.

- See Chapter 4D, *Privacy – ‘Surreptitious or Secret Filming’*
- See Channel 4’s and Five’s *Secret Filming Rules at Appendices 7C & 8C*

PAYMENTS

- Do not make payments to sources or contributors without reference to and the approval of the broadcaster. This does not include modest out-of-pocket expenses e.g. to cover meals and taxi fares, which are unlikely to be problematic.
- You must seek advice from the programme lawyer before making or promising to make any payment to a convicted or confessed criminal.
- You must not make any payment or promise to make any payment to any

witness or defendant involved in any kind of legal proceedings without the consent of the commissioning editor and programme lawyer. Where criminal proceedings are likely and foreseeable, again never pay or promise to pay a potential witnesses without first consulting with your commissioning editor and taking advice from the programme lawyer.

- See Chapter 4B, Crime – ‘Payments’
- See Chapter 5B, Contempt

DEALING WITH CONTRIBUTORS

- If advertising for contributors, the wording of adverts should be approved by the commissioning editor and programme lawyer.
- Contributors should take part in programmes on the basis of their informed consent.
- Consent should normally be in the form of a signed release form, although consent on camera may be satisfactory.
- Any ‘set-ups’ or use of deception must be justified by the public interest and this must always be agreed in advance by the broadcaster, unless it is intended to seek consent of those filmed before broadcast.
- Letters to key prospective contributors should be approved by the commissioning editor and programme lawyer before being sent.
- Any approach to seek a response (right of reply) in relation to significant allegations or criticisms must be discussed and approved in advance by the programme lawyer.
- Any conditions placed on interviews by contributors must be agreed by the programme lawyer before programme-makers accept. Programme-makers

cannot agree to give contributors previews of programmes without the consent of the commissioning editor. **Editorial control must never be ceded.**

- Any attempt to seek an interview without prior arrangement i.e. a ‘doorstep’, must be discussed and approved by the programme lawyer in advance.
- Programme-makers must comply with the rules on payments.
- Interviews must be fairly edited.
- Individuals in distress should not be put under pressure to agree to be interviewed or otherwise take part in a programme.
- If filming with the police or other authorities, seek advice from the programme lawyer.
- If a source seeks an absolute guarantee of anonymity seek immediate advice from your programme lawyer.
- See Chapter 4C, Fairness – in particular ‘Fairness & Contributors’
- See Chapter 4D, Privacy, in particular ‘Privacy & Contributors’

PEOPLE UNDER 18

- Due care must be taken with regard to the physical and emotional welfare and the dignity of people under 18 years who are involved in programmes. Further, unnecessary distress or anxiety must not be caused.
- Parental consent will be required for individuals under 16 appearing in programmes, unless their contribution is minor and uncontroversial, or it is warranted to proceed without such consent.
- Similar considerations must be had with regard to ‘vulnerable adults’ i.e. those unable to give informed consent e.g.

because of mental disorder.

- See Chapter 6E, ‘Programmes Involving Under 18s’ Checklist
- See Chapter 4C, Fairness – ‘Consent & Children and Young People’ and ‘Consent & Vulnerable Adults’
- See Chapter 4D, Privacy – ‘Privacy & Contributors’ and ‘The Involvement of Under 18s in Programmes Generally’

FAIRNESS & PRIVACY

- We must avoid the unfair treatment of individuals or organisations in programmes.
- If the programme you are making involves criticising or making any damaging allegation about any living individual or organisation, seek advice from your programme lawyer.
- Any significant infringement of privacy of an individual or organisation, in the making or broadcast of a programme, must be warranted by the public interest.

- See Chapter 4C, Fairness
- See Chapter 4D, Privacy

CRIMINALITY

- Programmes involving criminals or about criminality require special care and are likely to be legally contentious.
- See Chapter 6F, ‘Programmes Concerning and/or Involving Crime’ Checklist
- See Chapter 4B, Crime
- See Chapter 5B, Contempt and Reporting Legal Proceedings
- See Chapter 5F, Programmes Involving Criminal Activity

IMPARTIALITY

- Programmes dealing with matters of political or industrial controversy or matters relating to current public policy should be duly impartial.

- See Chapter 4F, Impartiality

POTENTIALLY OFFENSIVE MATERIAL

- Material with the potential to cause offence e.g. strong language, violence, sexual violence, explicit sexual portrayal etc. must always be justifiable by the context. Advice should be sought from the legal & compliance department at an early stage.
- The commissioning editor, on the advice of the programme lawyer, will ensure that an on-air warning is given to viewers, where appropriate.

- See Chapter 4A, Protection of Under 18s & Harm and Offence

COMMERCIAL REFERENCES

- Programmes should not give undue prominence to commercial products or services.
- Product placement is prohibited.
- Where programmes contain viewer competitions and/or premium rate telephone lines for viewers to call, seek advice from the programme lawyer.
- Sponsored programmes must not contain promotional references to the sponsor, its activities or products or services.
- Advertisements or clips from advertisements used within programmes will require strong editorial justification. Always seek advice from your programme lawyer.
- See Chapter 4H, Editorial Independence and Commercial References within Programmes

MEDIA LAW**DEFAMATION**

If the programme you are making involves criticising or making any damaging allegation about any living individual or organisation, seek advice from your programme lawyer immediately.

- See Chapter 5A, Defamation
- See also Chapter 4C, Fairness

CONTEMPT

If your programme involves or makes reference to any active or current legal proceedings, particularly criminal legal proceedings or those involving children, seek advice from your programme lawyer immediately.

- See Chapter 5B, Contempt & Reporting Legal Proceedings

PRIVACY AND CONFIDENCE

If your programme may contain private or confidential information without the consent of the person or organisation to which it relates seek advice from your programme lawyer immediately.

- See Chapter 5C, Privacy, Confidence and Data Protection
- See also Chapter 4D, Privacy

COPYRIGHT

All material must be properly cleared for use within programmes and this is the responsibility of producers. Wherever programme-makers wish to rely on one of the statutory defences to copyright infringement e.g. fair dealing or incidental inclusion, they must seek advice from the programme lawyer at an early stage.

- See Chapter 5D, Copyright & Fair Dealing

Programmes may well give rise to further legal issues e.g. Official Secrets Act legislation, Protection of Children Act. If in doubt seek advice immediately.

- See Chapter 5E, Other Laws Affecting Broadcasting

BEST PRACTICE

● Under the process of 'disclosure', journalists' notes, emails, letters, all correspondence etc. are 'disclosable' in legal proceedings i.e. copies may be provided to the other party, so think carefully about how they are written. Rushes are also 'disclosable' so be careful about presenter/reporter comments before and after filmed sequences, which could be misinterpreted.

● Documents written for the dominant purpose of receiving legal advice should be headed "Privileged", as they will be subject to legal professional privilege. This means they are exempt from disclosure i.e. the other party to the litigation will not be provided with a copy.

● Journalists, when working on sensitive or legally contentious programmes, should carry documentation identifying them at all times unless it would be inappropriate or dangerous to do so.

TRAVELLING ABROAD

● Filming abroad may give rise to special legal and health and safety issues, especially if it involves undercover filming. All such filming must be approved by the commissioning editor and programme lawyer in advance. In addition, if filming for Channel 4 is to take place in a potentially 'hostile' country or environment, programme-makers must read and comply with the Channel 4's Hostile Environment Protocol at Appendix 7D.

6B. COMEDY & ENTERTAINMENT PROGRAMMING

The following is a checklist of legal and compliance issues that may arise in comedy and entertainment programming, with suggested further reading which gives a more detailed description and explanation of the issues. This document is not intended to be a substitute for seeking appropriate and timely legal advice.

OFCOM BROADCASTING CODE

LIVE PROGRAMMES

● Live programmes have special requirements. For this reason, you must read and follow the particular broadcaster's live programme procedures.

- See Chapter 2, Channel 4's Compliance Procedures
- See Chapter 3, Five's Compliance Procedures
- See Channel 4's Live Programme Procedures at Appendix 7B
- See Five's Live Programme Procedures at Appendix 8B

POTENTIALLY OFFENSIVE MATERIAL

● Material with the potential to cause offence e.g. strong language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language, must be justifiable editorially and by the context. Advice should be sought from the programme lawyer at an early stage where such material is to be included in programmes.

● Where appropriate, the commissioning editor, on the advice of the programme lawyer, will ensure that an on-air warning is provided to enable viewers to make informed choices about what they watch.

● Nothing broadcast should be intended to stir up racial hatred or, taking into account the circumstances, be likely to

do so. Racist terms should be avoided in programmes, as should insensitive comments or stereotyped portrayals of particular ethnic groups, unless there is strong editorial justification, in the particular context.

● Jokes and material at the expense of those with disabilities are likely to cause widespread offence. Patronising or outdated derogatory expressions relating to disability should generally be avoided unless it is justified editorially and by the context. Similar considerations apply to jokes and material about other minority groups e.g. older people, homosexuals, religious faiths or language groups.

● Material that amounts to an unwarranted, abusive or derogatory treatment of the religious views and beliefs of those belonging to a particular religion should be avoided. Whilst there is scope for negative and/or humorous material concerning aspects of religion, care should be taken not to undermine or ridicule central beliefs. If in doubt, seek advice from the programme lawyer.

● Nothing transmitted should encourage, incite or condone criminal activity.

● See Chapter 4A, Protecting Under 18s & Harm and Offence

TOPICAL HUMOUR

● Many comedy and entertainment shows on television seek to provide a humorous take on current affairs and other stories in the news. However, since television is a much more closely regulated medium than the press, there may be stories appearing in other parts of the media e.g. in newspapers, magazines or on the internet, that we can only make reference to with particular care.

● Many stories that appear in newspapers involve a victim of some kind e.g. of war,

terrorism, crime, natural disaster, illness or accident. Humour based on these stories must have regard to the feelings not only of the victims and their families (who may or may not be watching) but also to the general viewing public, who are likely both to empathise and sympathise with the victim(s) and those close to them.

● There may be certain stories in respect of which any attempt at humour would be problematic e.g. a joke about hostage-taking around the time that a British hostage had been murdered would be likely to cause widespread offence and be unacceptable. Similarly, jokes about natural disasters or serious accidents involving loss of life, around the time these events happened, would be likely to be problematic.

● Other stories in the news involving victims may not be so clear-cut and a view will need to be taken as to whether humour based on such stories is acceptable. Common sense dictates that the more serious the plight of the victim(s), the less likely that humour based on the story will be permissible. In addition, the amount of time that has elapsed between the event in question and the references being made is likely to play a factor in whether the material is acceptable.

● Most viewers expect broadcasters to display a degree of respect for those people in the public eye that have recently died and for those close to them they leave behind. Consequently, humour based around a recent death is likely to cause widespread offence.

● If in doubt about the suitability of any material, seek advice from the commissioning editor and the programme lawyer.

● See Chapter 4A, Protecting Under 18s & Harm and Offence, in particular 'Preserving Human Dignity, Scenes Showing Humiliation and People in

Distress' and 'Intervening Events'

- See Chapter 4C, Fairness – 'Fairness & Non-Contributors'
- See Chapter 4D, Privacy – 'Privacy & Non-Contributors'
- See Chapter 5A, Defamation.
- See Chapter 5B, Contempt and Reporting Legal Proceedings'
- See Chapter 5C, Privacy, Confidence and Data Protection

DEALING WITH CONTRIBUTORS

● Contributors should generally take part in programmes having given informed consent.

● Consent should normally be in the form of a signed release form, although consent filmed on camera may be satisfactory. Both should certify that the nature and content of the programme have been explained to them.

● Any 'set-ups' or use of deception must be justified in the public interest, unless it is intended to seek the informed consent of those filmed prior to broadcast. The permission of the broadcaster will always be required before the use of any deception, regardless of the basis on which it may be justified. You must seek advice from your programme lawyer at an early stage.

● Any conditions placed on interviews or contributions by those taking part in programmes must be agreed by the commissioning editor, who will seek the advice of the programme lawyer, before programme-makers accept them. Programme-makers should not agree to give contributors previews of programmes or rights of veto without the consent of the commissioning editor. **Editorial control must never be ceded to third parties.**

● Programme-makers must comply with the Code's rules on payments. In particular, programme-makers must seek the advice

of the programme lawyer before making or promising to make any payment to a convicted or confessed criminal or any potential witness in criminal proceedings even if the context in which they are to be featured is humorous or entertaining.

- Interviews must be edited fairly.

- See Chapter 4B, *Crime, in particular 'Payments'*
- See Chapter 4C, *Fairness – 'Fairness & Contributors'*
- See Chapter 4D, *Privacy – 'Privacy & Contributors'*

PEOPLE UNDER 18

● Due care must be taken with regard to the physical and emotional welfare and the dignity of people under 18 years who are involved in programmes. Unnecessary distress or anxiety must not be caused.

● Parental consent will be required for individuals under 16 appearing in programmes, unless their contribution is merely incidental, minor and uncontroversial, or it is warranted to proceed without such consent. Parental consent for those aged 16 and 17 may also be appropriate, depending on the nature of the contribution. Seek advice from your programme lawyer if unsure.

● Similar considerations apply with regard to 'vulnerable adults' e.g. those unable to give informed consent because of incapacity or disability.

- See Chapter 6E, *'Programmes Involving Under 18s' Checklist*
- See Chapter 4C, *Fairness – 'Consent & Children and Young People' and 'Consent & Vulnerable Adults'*
- See Chapter 4D, *Privacy – 'Privacy & Contributors' and 'The Involvement of Under 18s in Programmes Generally'*

FAIRNESS & PRIVACY GENERALLY

● The unfair treatment of individuals or organisations in programmes must be avoided.

● If the programme you are making involves criticising or making any damaging allegation about any living individual or organisation, seek advice from your programme lawyer immediately.

● Any significant infringement of privacy of an individual or organisation, in the making or broadcast of a programme, must either be warranted by the public interest or the individual or organisation must have consented to the material in question being broadcast.

● As above, just because a story appears in a newspaper does not necessarily mean that it can be referred to and dealt with in the same way. Television is far more strictly regulated than the press.

● Any contentious material must be referred to the programme lawyer as soon as possible.

- See Chapter 4C, *Fairness*
- See Chapter 4D, *Privacy*

COMMERCIAL REFERENCES WITHIN PROGRAMMES

● Programmes should not give undue prominence to commercial products or services.

● Product placement is prohibited.

● Where programmes contain viewer competitions and/or premium rate telephone lines for viewers to call, seek advice from the programme lawyer.

● Sponsored programmes must not contain promotional references to the sponsor, its activities or products or services.

● Advertisements or clips from advertisements for commercial products or services, used within programmes, will require clear editorial justification. Always seek advice from your programme lawyer.

- See Chapter 4H, *Editorial Independence and Commercial References within Programmes*

MEDIA LAW

DEFAMATION

If the programme you are making involves criticising or making any damaging allegation, even as a joke, about any living individual or organisation, seek advice from your programme lawyer immediately.

- See Chapter 5A, *Defamation*

CONTEMPT

If your programme involves or makes reference to any active or current legal proceedings, particularly criminal legal proceedings, or those involving children, seek advice from your programme lawyer immediately.

- See Chapter 5B, *Contempt and Reporting Legal Proceedings*

COPYRIGHT

All material must be properly cleared for use within programmes and this is the responsibility of producers. Wherever programme-makers wish to rely on one of the statutory defences to copyright infringement e.g. fair dealing or incidental inclusion, they must seek advice from the programme lawyer at an early stage.

- See Chapter 5D, *Copyright & Fair Dealing*²²²

Programmes may well give rise to further legal issues. If in doubt seek advice immediately.

- See Chapter 5E, *Other Laws Affecting Broadcasting*

PARLIAMENTARY FOOTAGE

Parliamentary footage i.e. from within the House of Commons and House of Lords (including Committees in both Houses) cannot be used in light entertainment (including satire) or drama programmes. Similar rules apply to footage from within other parliaments and assemblies e.g. the Scottish Parliament, Welsh and Northern Ireland Assemblies. If in doubt, seek advice from the programme lawyer.

- See Chapter 4F, *Due Impartiality – 'Parliamentary Footage and Footage from Other Assemblies'*

6C. REALITY SHOWS, FACTUAL ENTERTAINMENT PROGRAMMES & FORMATTED DOCUMENTARY PROGRAMMING

The following is a checklist of best practice and regulatory and legal issues that may arise in the above types of programming i.e. those which rely on the prominent featuring of members of the public, with suggested further reading which gives a more detailed description and explanation of the issues. This document is not intended to be a substitute for seeking appropriate legal advice.

OFCOM BROADCASTING CODE

TRUTH, ACCURACY & ADVICE TO VIEWERS

- Channel 4 and Five take the issue of viewer trust very seriously. Viewers are entitled to expect that programmes are accurate and true and the audience must not be misled. This obligation applies to all types of programming, including entertainment programmes with factual elements. Portraying real events, whether in documentary, features, factual entertainment, drama or any other programme, which the viewer is entitled to take at face value, must respect truth and accuracy. Programmes should be true and accurate.
- Consideration should be given to the inclusion in contributor's agreements of a warranty as to the truth and accuracy of their contribution.
- The qualifications, experience and other credentials of presenters and experts who appear in programmes must be checked and properly verified.
- If any events are to be reconstructed, seek advice from the programme lawyer. The footage may need to be labelled as having been reconstructed.

● See Chapter 4A, *Protecting Under 18s & Harm and Offence – 'Viewer Trust: Truth,*

Accuracy and the Importance of not Misleading the Audience'

- See Channel 4's *Viewer Trust Guidelines at Appendix 7A*
- See Five's *Viewer Trust Guidelines at Appendix 8A*

FAIRNESS & PRIVACY: CONTRIBUTORS

- Programme contributors must be told the nature of the programme to which they are being invited to contribute, the nature of the contribution they are expected to make and how it is to be used within the programme.
- If a show's format involves deceiving contributors in any way, advice must be sought from the programme lawyer and, where appropriate, safeguards put in place. Informed consent before broadcast is likely to be necessary without adequate public interest justification.
- Programme titles should always be qualified in correspondence and contributor agreements/release forms with 'working title' or 'provisional title' in case the title changes nearer to transmission. Consideration should be given as to whether a change in title could materially affect an individual's decision to take part. If unsure, advice should be sought from the programme lawyer.
- Programmes often evolve during the production process, so ensure contributors are kept up to date with changes in the content and structure of the programme, especially if new contributors are introduced who may be an issue for those people who have already made their contribution.
- If there is a delay in transmission of a completed programme, intervening events may affect an individual's contribution to a programme.

● Programmes must not be edited in such way which causes material unfairness to contributors. If a contributor is portrayed negatively e.g. they are shown as having acted naively or foolishly, consider whether they have an opportunity in the programme to explain why they acted as they did.

● Contributors may agree to filming which amounts to a substantial infringement of their privacy. Producers must be comfortable with and be able to justify editorially the level of intrusion that is being agreed to by the contributor. This is particularly relevant when filming children. Their physical and psychological wellbeing is of paramount importance. They must not be exploited or placed at any physical or moral risk.

- See Chapter 4C, Fairness – ‘Fairness & Contributors’
- See Chapter 4D, Privacy – ‘Privacy & Contributors’

FAIRNESS & PRIVACY: GENERALLY

● Care needs to be taken to ensure that the privacy rights of third parties i.e. those not actually taking part in the programmes e.g. family, friends or work colleagues referred to or identified by a contributor, are not infringed by what is broadcast. Similarly what is broadcast should not amount to an unfair treatment of individuals or organisations.

- See Chapter 4C, Fairness
- See Chapter 4D, Privacy

PEOPLE UNDER 18

● Due care must be taken with regard to the physical and emotional welfare and the dignity of people under 18 years who are involved in programmes. Unnecessary distress or anxiety must not be caused.

● Parental consent will be required for individuals under 16 appearing in programmes, unless their contribution is

minor and uncontroversial, or it is warranted to proceed without such consent.

● Similar considerations must be had with regard to ‘vulnerable adults’ i.e. those unable to give informed consent e.g. because of disability.

- See Chapter 6E, ‘Programmes Involving Under 18s’ Checklist
- See Chapter 4C, Fairness – ‘Consent & Children and Young People’ and ‘Consent & Vulnerable Adults’
- See Chapter 4D, Privacy – ‘Privacy & Contributors’ and ‘The Involvement of Under 18s in Programmes Generally’

POTENTIALLY OFFENSIVE MATERIAL

● Material with the potential to cause offence e.g. strong language, violence, explicit sexual portrayal must always be justifiable by the context. Advice should be sought from the programme lawyer at an early stage.

● The commissioning editor, on the advice of the programme lawyer, will ensure that an on-air warning is given to viewers, where appropriate.

- See Chapter 4A, Protecting Under 18s & Harm and Offence

COMMERCIAL REFERENCES WITHIN PROGRAMMES

● Programmes should not give undue prominence to commercial products or services.

● Product placement is prohibited.

● Where programmes contain viewer competitions and/or premium rate telephone lines for viewers to call, seek advice from the programme lawyer.

● Sponsored programmes must not contain promotional references to the

sponsor, its activities or products or services.

● Advertisements or clips from advertisements used within programmes will require clear editorial justification. Always seek advice from the programme lawyer.

- See Chapter 4H, Editorial Independence and Commercial References within Programmes

MEDIA LAW

DEFAMATION

If the programme involves criticising or making any damaging allegation about any living individual or organisation, seek advice from the programme lawyer immediately.

- See Chapter 5A, Defamation

CONTEMPT

If the programme involves or makes reference to any active or current legal proceedings, particularly criminal legal proceedings, or involves children seek advice from the programme lawyer immediately.

- See Chapter 5B, Contempt

PRIVACY AND CONFIDENCE

If your programme may contain private or confidential information without the consent of the person or organisation to which it relates seek advice from your programme lawyer immediately.

- See Chapter 5C, Privacy, Confidence and Data Protection
- See also Chapter 4D, Privacy

COPYRIGHT

Where programme-makers wish to avail themselves of one of the statutory defences to copyright infringement e.g. fair dealing, incidental inclusion, they must seek advice from the programme lawyer.

- See Chapter 5D, Copyright and Fair Dealing

BEST PRACTICE

CHECKS ON CONTRIBUTORS' BACKGROUNDS

● Application forms and contributor agreements should always require contributors and potential contributors to disclose any criminal convictions or pending legal proceedings in which they are involved.

● If contributors are to be placed together in a ‘reality’ setting, consideration should be given to requiring each contributor to obtain a Subject Access check on (a) the Police National Computer and (b) their local police authority’s systems, to ascertain whether they have had any dealings with the police. [Note: the applications can take up to 12 weeks to process and must be made by the individual him/herself].

● If relevant to the content of the programme in which they are appearing, contributors should disclose details of any matrimonial and childcare proceedings, including any court orders made. If anything is disclosed, the commissioning editor and programme lawyer should be contacted immediately.

● Where appropriate, proof of identity and references i.e. personal and/or professional should be sought and checked.

● Through discussion with the contributor, programme-makers should ascertain whether there is anything else about the contributor or someone close to him/her e.g. a close family member, which could have the potential to lead to adverse public relations issues and whether there is any conflict of interest or matter that could compromise them or the programme, given the nature of the programme.

● In certain circumstances, it may be necessary to undertake research to confirm the credentials of a contributor (including presenters and experts) or the truth of what they are telling you. Potential contributors should not be taken at face value. Some may have reason to be less than totally honest, or may even be trying to deceive production staff deliberately.

SUPPORT FOR AND PAYMENTS TO CONTRIBUTORS

● It may be appropriate in certain circumstances to obtain an expert opinion e.g. medical, psychological or counselling-based, to ascertain a contributor's suitability for their taking part in a particular programme.

● It may be appropriate in certain circumstances for support e.g. medical, psychological or counselling-based, to be provided to relevant contributors e.g. throughout filming, to transmission of the programme and, sometimes, beyond.

● Consideration should be given as to whether contributors should be paid for their contribution and where they are, the actual amount that is paid. In some cases, it may be appropriate merely to recompense contributors for their time and the expenses they have incurred. Payments to Under 18s must be agreed in advance by the commissioning editor and programme lawyer.

● Care needs to be taken when payments are contemplated to anyone who has been involved in criminal or anti-social acts. Seek advice from the programme lawyer before any commitment is made.

● See Chapter 4B, Crime – 'Payments'

COMMUNICATION AND CORRESPONDENCE

● Queries and concerns raised by contributors should be dealt with

promptly. The commissioning editor should be appraised of the circumstances as soon as possible.

● Programme-makers and commissioning editors should alert the programme lawyer to serious potential issues at the earliest possible stage, so they can advise on how to deal with the matter.

6D.
DRAMA

The following is a basic checklist of legal and compliance issues that may arise in drama productions, with suggested further reading which gives a more detailed description and explanation of the issues. This document is not intended to be a substitute for seeking appropriate and timely legal advice.

Clearly, the issues likely to arise in television drama will depend to a large extent on the subject matter and also whether the drama is an entirely fictional piece or whether it is entirely, or partly, based on real facts, events and characters.

FICTIONAL DRAMA

● Fictional drama with invented characters and storylines may still contain references to individuals, organisations or things that exist in the real world, e.g. for authenticity. Where this is the case, as in factual programmes, care must be taken to ensure that material is not defamatory, causes unfairness or constitutes an unwarranted infringement of the privacy of identifiable individuals or organisations. If in any doubt, programme-makers and commissioning staff should seek advice from the programme lawyer at an early stage.

● In fictional drama, there may be a risk that some elements are mistakenly understood by viewers to be real. To minimise this risk, invented names of characters or organisations should be checked at an early stage to ensure they don't closely correspond with names in the real world, which could lead to problems. This process is commonly referred to as 'negative checking'. A 'neg-checking' report should be prepared on the script at an early stage, long before the script is finalised.

● Even where the 'neg-checking' process confirms that a name is safe to use, there

may still be a significant risk of viewers identifying mistakenly a fictional character or organisation with a real-life one, based on other details that are given. Where this is the case, especially where there is a risk of accidental defamation, advice must be sought from the programme lawyer at an early stage, before the script has been finalised or plans to shoot have been made.

● See Chapter 5A, Defamation – in particular 'Intentional/Accidental Defamation'

FACT-BASED DRAMA

The term "fact-based drama" or "factual drama" covers a broad range, from those which are very loosely inspired by real facts and events to those drama-documentaries which seek to reconstruct accurately actual events. Often fact-based dramas will not fall squarely within either category and storylines may be a mix of both fact and fiction. Programme-makers should have regard to the following matters.

OFCOM BROADCASTING CODE

FAIRNESS AND PRIVACY

● All fact-based dramas should be referred to a programme lawyer for advice at a very early stage whilst the script is still in development.

● Programme-makers must inform the commissioning editor and programme lawyer wherever a storyline, character or organisation in a drama has been based upon someone or something real, especially where this is not obviously apparent.

● Dramas based on real events will usually portray and refer to identifiable real people and organisations, so we must ensure that the way in which they are portrayed is fair and historically accurate - just as if the allegations

were being made in a factual programme.

● Where the subject matter is contentious, accuracy is likely to be vitally important. In practice, this will mean that careful research is essential to ensure that material facts are included and not disregarded or omitted in a way that results in any unfairness. This will be important both to comply with regulatory obligations under the Code and to ensure programmes are not libellous.

● As with factual programmes that criticise individuals or organisations or make damaging allegations, it may be necessary to seek a response from the individual or organisation concerned and to include any response within the drama. This should only be done on the advice of the programme lawyer. Again, this may be important to ensure programmes are not libellous.

● The privacy of individuals or organisations portrayed or referred to in fact-based dramas is also likely to require careful consideration, particularly where the subject matter relates to things of a private or confidential nature. In common with other types of programming, fact-based drama must not unjustifiably infringe privacy.

● Decisions as to whether an infringement of privacy is justified will normally turn on whether, in all the circumstances, there is an overriding public interest in broadcasting the material, i.e. whether the public interest and programme-makers/broadcaster's right to freedom of expression outweighs the individual's or organisation's right to privacy taking into account other relevant factors, e.g. the extent to which the potentially infringing material is already in the public domain.

● Inevitably, even in the most carefully researched drama-documentary, the creative realisation of some elements, such as dialogue and characterisation, will introduce a fictional dimension. This

is likely to be perfectly acceptable as long as it is not inconsistent with the known facts and does not cause unfairness to any individual or organisation.

● Care must be taken with dramas which mix fact with significant elements of fiction. There is a risk that the factual elements may become confused with what is invented. This may result in unfairness to real-life individuals or organisations that are identified or identifiable. Such dramas must be carefully considered to ensure that the factual elements are fair and accurate and also that the fictional elements do not raise unfairness or libel issues. This is likely to require very careful consideration, over and above merely 'neg-checking' names. Early advice from the programme lawyer will be essential.

● The fictional elements of those dramas which mix real individuals and organisations with fictional ones will need to be properly neg-checked at an early opportunity.

● To ensure viewers are not misled, it will often be appropriate to flag up to viewers the basis for a particular drama e.g., by labelling the film: "*This is a true story...*", "*... based on a true story...*" or "*... inspired by real-life events...*".

● Sometimes, it may be necessary or prudent to include within a drama a disclaimer e.g.: "Whilst elements of [name of drama] are inspired by real-life events, the storyline and all associated characters and organisations are entirely fictional. Any resemblance to real individuals or organisations is purely coincidental and unintentional". Such disclaimers may appear as a caption at the beginning or end of a drama, close to or as part of the end credits.

● See Chapter 4C, Fairness
● See Chapter 4D, Privacy

● See Chapter 5A, Defamation

CONSULTATION/CONTACT WITH THOSE INVOLVED

● Where dramas are based upon or concern past events, particularly where the subject matter is capable of giving rise to personal distress, e.g. natural disaster, accident, crime, it may be necessary to consult with those affected by the real-life event upon which the drama is based e.g. victims, victims' families, survivor groups and to give due consideration to their perspectives, taking into account how recently the event took place, the extent to which the event continues to attract wider media attention and the public interest in broadcasting the material. As noted above, it is important that the portrayal of such events does not result in unfairness or the unwarranted infringement of privacy of any individual or organisation.

● Where fact-based dramas revisit past events that could give rise to personal distress, we must consider the feelings of those directly involved and, where practicable, should inform such people of the times of intended transmission of the drama and from when programme trails will start to be transmitted. Where there are many such people e.g. there are many victims or close relatives of victims, as in a large scale accident or natural disaster, it may be appropriate to alert people through a survivor or support group.

● Advice regarding consulting or contacting those directly involved in or affected by the subject matter of a fact-based drama should be taken from the programme lawyer at an early stage.

IMPARTIALITY

● Drama, whether fictional or fact-based, must comply with the impartiality provisions of the Ofcom Broadcasting Code ("the Code"), i.e. unless other arrangements have been made to ensure

impartiality, programmes should be duly impartial on matters of political or industrial controversy and matters of current public policy, e.g. political issues, domestic and foreign policy, introduction or abolition of laws, industrial action, strikes.

● See Chapter 4F, Impartiality

PEOPLE UNDER 18

● Due care must be taken to ensure the physical and emotional welfare and dignity of people under 18 years who are involved in programmes. They must not be caused unnecessary distress or anxiety.

● Parental consent will normally be required for individuals under 16 appearing in drama productions. In addition, a performing licence from the child's Local Authority may be required.

● Advice must be sought from the programme lawyer wherever an actor under the age of 18 is to take part in a scene of a sexual nature. Any actors required to take part in scenes of an explicit sexual nature must be aged 18 or over; otherwise, a criminal offence may be committed.

● See Chapter 6E, 'Programmes Involving Under 18s' Checklist

● See Chapter 4C, Fairness – 'Consent & Children and Young People' and 'Consent & Vulnerable Adults'

● See Chapter 4D, Privacy – 'Privacy & Contributors' and 'The Involvement of Under 18s in Programmes Generally'

● See Chapter 6E, 'Protection of Children Act' & 'Child Performance Licences'

COMMERCIAL REFERENCES WITHIN DRAMA

● Dramas should not give undue prominence to commercial products or services.

● Product placement is prohibited.

● Dramas which are sponsored must not contain promotional references to the sponsor, its activities or products or services.

● See Chapter 4H, Editorial Independence and Commercial References within Programmes

POTENTIALLY OFFENSIVE MATERIAL

● Dramatic content with the potential to cause offence e.g. violence, strong language, sex, nudity etc. must always be justifiable by the context. Advice should be sought from the programme lawyer at an early stage.

● The broadcaster's presentation department, on the advice of the commissioning editor and programme lawyer, will ensure that an on-air warning is given to viewers where appropriate.

● See Chapter 4A, Protecting Under 18s & Harm and Offence

● For Channel 4 programmes, see Channel 4's Compliance Procedures at Chapter 2

CRIME

● Fact-based drama relating to real-life criminal activity and/or legal proceedings are likely to be legally contentious, so must be referred to the programme lawyer at an early stage.

● See Chapter 4B, Crime

● See Chapter 5A, Defamation

● See Chapter 5B, Contempt and Reporting Legal Proceedings

● See Chapter 6F, Programmes Involving or Concerning Crime Checklist

MEDIA LAW

DEFAMATION

If the drama you are making involves criticising or making any damaging

allegation about any living individual or organisation, seek advice from your programme lawyer immediately.

● See Chapter 5A, Defamation

PRIVACY

If the drama you are making involves any potential infringement of the privacy of real individuals or organisations, seek advice from your programme lawyer immediately.

● See Chapter 5C, Privacy, Confidence & Data Protection

CONTEMPT

If your programme involves or makes reference to any active or current legal proceedings, particularly criminal legal proceedings or those involving children, seek advice from your programme lawyer immediately.

● See Chapter 5B, Contempt & Reporting Legal Proceedings

COPYRIGHT

All material must be properly cleared for use within programmes in accordance with the production agreement. This is the responsibility of producer.

● See Chapter 5D, Copyright & Fair Dealing

TRAVELLING ABROAD

Filming abroad may give rise to special legal and health & safety issues, especially if it involves undercover filming. All such filming must be approved by the commissioning editor and programme lawyer in advance. In addition, if filming for Channel 4 is to take place in a potentially 'hostile' country or environment, programme-makers must read and comply with Channel 4's Hostile Environment Protocol.

● See Channel 4's Hostile Environment Protocol at Appendix 7D

PARLIAMENTARY FOOTAGE

Parliamentary footage i.e. from within the House of Commons and House of Lords (including Committees in both Houses) cannot be used in light entertainment (including satire) or drama programmes. Similar rules apply to footage from within other parliaments and assemblies e.g. the Scottish Parliament, Welsh and Northern Ireland Assemblies. If in doubt, seek advice from the programme lawyer.

● See Chapter 4F, Due Impartiality – 'Parliamentary Footage and Footage from Other Assemblies'

6E. PROGRAMMES INVOLVING UNDER 18s

Programmes involving Under 18s require special care. There are numerous legal and regulatory provisions that exist to protect minors. Below is a summary of the issues that may arise in programmes involving Under 18s together with suggested further reading. If you are in doubt about any particular issue, please contact your programme lawyer for advice.

OFCOM BROADCASTING CODE

CONSENT

● If a programme contributor is under 16, in addition to that of the child, consent to take part should be obtained from his/her parents or guardians, or other person aged eighteen or over with legal responsibility for the young person. Ideally, both parents' consents should be sought for the child's contribution. However, this will not always be possible or practicable. If a young person's parents are divorced or separated, parental consent should, in the first instance, be sought from the parent the child resides with and who has 'parental responsibility'. As to whether or not consent should be sought from the other parent as well, seek advice from the programme lawyer.

● Where a contributor is 16 or 17, it may still be appropriate to seek parental consent, depending on the particular circumstances. If in doubt, seek advice.

● There may be occasions where parental consent for a child's contribution is deemed unnecessary e.g. a vox pop situation, where the subject matter is uncontroversial and is not of a sensitive nature. The age and understanding of the child, the subject matter of the programme and the nature of the child's participation will all be relevant when deciding whether parental consent is necessary.

● If filming in a school, consent should be obtained from the Head Teacher, who may also require you to inform all parents that filming is taking place. Specific consent is likely to be necessary from the parents of the principal children featured on camera, particularly those who actively participate in filming.

● In certain circumstances, in addition to parental consent, a Local Authority licence may be required before a child can take part in a programme during term time. If a child's role in a film is to perform e.g. in an entertainment capacity, a "licence to perform" may be required. This is obtained from the relevant Local Authority if the child is under the upper age limit of compulsory school attendance. This relates primarily to child actors in long-running shows or series and not to appearances within one-off documentaries. If in doubt about whether such a licence is required, seek advice from the programme lawyer.

● See Chapter 4D, *Privacy – 'The Involvement of Under 18s in Programmes Generally'*

● See Chapter 6E, *'Child Performance Licences.'*

TREATMENT OF UNDER 18s

● Due care must be taken with regard to the physical and emotional welfare and the dignity of people under 18 who take part in or are otherwise referred to in programmes, regardless of any consent given by the participant or by a parent or guardian.

● Under 18s must not be caused unnecessary distress or anxiety by their involvement in programmes or by the broadcast of those programmes. They must never be put at physical or moral risk e.g. in factual programmes concerning criminal activity.

● Under 16s should not be asked for views on matters likely to be beyond their comprehension or capacity to answer properly without the consent of an appropriate adult.

● Other regulatory requirements relating to the fair treatment of contributors generally will also apply to Under 18s, e.g. Under 18s should take part in programmes on the basis of their informed consent; interviews must be edited fairly; rules on payments must be complied with.

● Whenever Under 18s are interviewed in sensitive situations or take part in programmes of a controversial or sensitive nature, advice must be sought in advance from your programme lawyer so that appropriate safeguards can be put in place. In certain situations it may be necessary for child contributors to be accompanied by a parent/guardian or chaperone.

● Ofcom has published its own guidance to broadcasters in relation to the participation of under 18s within programmes. See 'Ofcom Guidance on the Participation of Under 18s in Programmes', Chapter 4D.

● See Chapter 4C, *Fairness – 'Fairness & Contributors'*

● See Chapter 4D, *Privacy – 'Privacy & Contributors'*

COMPETITIONS INVOLVING UNDER 18s

● Prizes aimed at children must be appropriate to the age range of the both the target audience and the participants e.g. large cash prizes or cars are unlikely to be appropriate.

● See Chapter 4H, *Editorial Independence & Commercial References within Programmes - Competitions*

FAIRNESS & PRIVACY

● As with any other contributor, programmes must avoid the unfair treatment of Under 18s and any infringement of privacy must be warranted.

● Particular attention must be paid to the privacy rights of those under 16. They do not forfeit their right to privacy simply because, for example, of the fame or notoriety of their parents.

● See Chapter 4C, *Fairness*

● See Chapter 4D, *Privacy*

MEDIA LAW

PROTECTION OF CHILDREN ACT

● Do not take or show (e.g. include in a programme) an indecent image of someone who is under the age of 18. This is a criminal offence. Merely involving a young person in a photograph or television image that is itself indecent, even where the child's role in it is not e.g. superimposing a child's picture onto an indecent image, is prohibited. If you are unsure whether or not an image involving a minor may be indecent, seek advice from the programme lawyer immediately.

● In drama or any reconstruction, where an actor is to be involved in a scene of an explicit sexual nature, the actor must be aged 18 or over, regardless of the age of the character he/she is playing. If in doubt about an actor's age, you must seek independent written verification.

● See Chapter 5E, *Other Laws Affecting Broadcasting*

LEGAL PROCEEDINGS INVOLVING UNDER 18s

● The identity of Under 18s involved in most legal proceedings is protected by the court - automatically in the Youth Court and by specific order in most other courts.

Any reference whatsoever to Under 18s involved in legal proceedings e.g. criminal or family proceedings, must be referred to the programme lawyer as soon as possible for advice.

- Where legal restrictions apply prohibiting the identification of minors involved in legal proceedings, programmes must be careful not to publish any material that would directly or indirectly lead to any of those individuals being identified, whatever their involvement in the proceedings.

- When covering pre-trial investigations into alleged offences, even where no legal restrictions apply, particular regard must be paid to the vulnerability of any minor involved before broadcasting his/her name, address, school or other educational establishment, place of work or any picture of them.

- See Chapter 4B, Crime – Court Reporting & Under 18s

- See Chapter 5B, Contempt & Reporting Legal Proceedings – ‘Legal Proceedings Involving Under 18s’

6F. PROGRAMMES INVOLVING OR CONCERNING CRIME

The following is a checklist of regulatory and legal issues and best practice that may arise in programmes involving or concerning crime, with suggested further reading which gives a more detailed description and explanation of the issues. This document is not intended to be a substitute for seeking appropriate legal advice.

OFCOM BROADCASTING CODE

GENERALLY

- Programmes must not encourage or incite crime or be likely to lead to disorder. Programmes should not give the impression of condoning criminal activity.
- Programmes should not contain essential details about criminal techniques that could enable the commission of a crime, unless there is sufficient editorial justification.

● See Chapter 4B, *Crime*

PROGRAMMES INVOLVING WITNESSES IN LEGAL PROCEEDINGS

- Programme-makers must seek advice from the programme lawyer whenever a witness or potential witness in legal proceedings takes part in a programme.

- Do not pay or promise to pay, directly or indirectly, any witness or any person reasonably expected to be called as a witness in criminal legal proceedings. The payment of any expenses must be approved by the commissioning editor and programme lawyer in advance.

- Similarly where criminal legal proceedings are “likely and foreseeable” do not make or promise to make any payment to anyone who might reasonably be expected to become a witness without first seeking advice from the programme lawyer.

- See Chapter 4B, *Crime – ‘Payments’*
- See Chapter 5B, *Contempt and Reporting Legal Proceedings*

FILMING WITH CONVICTED OR CONFESSED CRIMINALS

- Convicted or confessed criminals may be willing to be interviewed to talk about their crimes, or for other reasons. In all cases, advice must be sought from the programme lawyer as soon as practically possible and preferably before filming takes place. Given the potentially sensitive nature of such interviews, careful thought must be given to the conduct of such interviews and what is to be ultimately broadcast.

- No payment or promise of payment must be made to convicted or confessed criminals, or those close to them, e.g. family members, without first obtaining the broadcaster’s approval. Note: criminals will not be paid for interviews (or any other contribution) that relate to their crimes, unless it is justified by the public interest.

- See Chapter 4B, *Crime – in particular ‘Payments’ and ‘Programmes Involving Criminal Activity’*
- See Chapter 5F, *Programmes Involving Criminal Activity*

MEDIA LAW

PROGRAMMES REFERRING TO LEGAL PROCEEDINGS

- All references to active criminal legal proceedings must be referred to the programme lawyer for advice as early as possible. Proceedings become active when someone is arrested or charged with an offence. Nothing must be broadcast which creates a substantial risk of serious prejudice to active legal proceedings.

- Indeed, any reference to legal

proceedings, active or concluded, in particular those involving sexual offences or any proceedings involving under 18s must be referred to the programme lawyer for advice at the first available opportunity.

- Never approach jurors (past or present) or potential jurors without first seeking legal advice. Soliciting information from jurors about their deliberations is a criminal offence.
- Do not take any kind of recording device into a court room unless you have the explicit consent of the court to do so.
- If you seek to rely on documents or information sourced from documents which have been obtained through the legal disclosure, whether in civil or criminal proceedings, seek legal advice immediately. Use of the documents/information may be an offence.
- When referring to legal proceedings, programme-makers must check with the relevant court to ensure that there are no specific court orders in place relating to media reporting of a particular case.

- See Chapter 5B, *Contempt and Reporting Legal Proceedings*
- See Chapter 4B, *Crime*

TERRORISM & OFFICIAL SECRETS

- Programme-makers working on programmes investigating matters of terrorism must seek legal advice at the earliest opportunity and preferably before research begins. Unlike most other areas of the criminal law, terrorism legislation creates a positive obligation to disclose information relating to certain offences. Similarly, programme-makers working on programmes touching upon matters that could fall within the ambit of the Official Secrets Act must seek legal advice immediately.

- See Chapter 5E, *Other Laws Affecting Broadcasting*

BEST PRACTICE

FILMING CRIMINAL ACTIVITY

- Generally, filming criminal activity should not be undertaken without first seeking advice from your programme lawyer. In rare cases, where this is not possible, use your common sense and do not put yourself or your crew at any risk. In such circumstances, you must alert your commissioning editor and programme lawyer as soon as possible thereafter.

- When filming criminal activity, remember to remain as passive observers and do nothing that could be deemed as encouraging, inciting or assisting criminal activity, otherwise you are at risk of having committed a criminal offence yourself. Remember to make a careful distinction between observation and participation and keep any criminal behaviour at arm’s length. Do not provoke nor give the impression of provoking criminal behaviour which would not otherwise have occurred.

- Undercover investigations often have the goal of exposing criminal activity. They are invariably legally contentious and can present real dangers to the programme-makers that are undercover. Such investigations require very careful consideration, research and preparation and must not be undertaken before detailed advice has been sought from the programme’s commissioning editor and programme lawyer.

- See Chapter 4B, *Crime*
- See Chapter 5F, *Programmes Involving Criminal Activity*

DEALINGS WITH THE AUTHORITIES/POLICE

- Whilst there is a legal obligation to answer questions properly posed by a court of law, there is no legal obligation to provide information to the police for their enquiries. However, you must never be dishonest or attempt to mislead the police or tamper or dispose of evidence.
- Journalistic material, e.g. rushes, notebooks, films are given special protection from seizure by the police. Generally, the police need to obtain a court order from a judge before they can seize such material.
- Any approach from the police or other authorities relating to any aspect of the programme or in relation to handing over any footage or material related to the programme should be referred immediately to the commissioning editor and programme lawyer.

● See Chapter 5E, Other Laws Affecting Broadcasting

6G. THE USE OF TELEPHONY SERVICES

At the time of publication Ofcom is consulting on proposals to amend the Code's rules for programmes involving participation by viewers or listeners via premium rate services. Any updates to the Code will be published on Ofcom's website and updates to the Handbook will be published on the Handbook website.

The following is a basic checklist of legal and compliance issues that should be addressed in the use of telephony services, whether premium rate services ("PRS") or otherwise, in programmes and promotional time.

USING PRS

- Premium rate numbers and services must not appear in programmes (including promotional time) except where:
 - They form part of the editorial content of the programme; or
 - They fall within the meaning of "programme-related material"
 - Their use must comply with the PhonepayPlus (formerly ICSTIS) Code of Practice.

- See Ofcom Broadcasting Code, rules 1.28, 2.11, and 10.9 – 10.11;
- See Ofcom Broadcasting Code Guidance Note 2, section 2.11;
- See PhonepayPlus Code of Practice, sections 5, 6, and 7 (as appropriate);
- See PhonepayPlus Help Note on Pricing Information

PRICING AND OTHER INFORMATION

Viewers must be given the following information:

- Details of how the competition, voting, or

other interactivity operates, including details of the entry or voting route(s) available;

- The opening and closing times and dates during which responses will be accepted, which might be different according to the method of interactivity used;
- Details of where the detailed terms and conditions can be obtained (usually the broadcaster's website);
- Any key terms & conditions which are likely to affect a decision to participate (e.g. any age limit or requirement that the prize must be taken on a certain date);
- Pricing information in accordance with Ofcom and/or PhonepayPlus guidance.
- Details of any free method of response, which must be given due prominence.
- A requirement to obtain the bill payer's permission where the programme is aimed at, or likely to appeal to, children.

Special requirements apply to Call TV quiz services – see PhonepayPlus's 'Statement of Expectations for Call TV quiz services'.

TECHNICAL ISSUES

- Careful consideration must be given to the technical issues surrounding the use of PRS. All parties involved at the production company, broadcaster and service provider must liaise closely on arrangements for the opening and closing of lines and the winner selection or vote counting process.
- Adequate arrangements for the transmission, reception, and processing of votes, entries, or other responses must be in place and approved in advance by the broadcaster. This will involve discussions between you and the broadcaster, service provider, network

operators, and aggregators, particularly in relation to the expected size of audience for the programme and anticipated level of demand and use of the PRS.

- Sufficient provision must be made for the occurrence of technical problems. Procedures must be in place and approved by the broadcaster in advance of transmission to ensure that the possibility of disadvantage to members of the public is reasonably minimised. Measures to deal with the following non-exhaustive list of eventualities must be implemented:
 - Complete failure of one or more PRS before, after, and/or during viewer participation;
 - Partial failure or unavailability of one or more PRS during viewer participation;
 - Latency in SMS delivery;
 - Red Button users dropping their connection before the necessary information is transferred.

COMPETITIONS

- All entries must be treated in a fair and consistent manner, regardless of the means of entry.
- All qualifying entries must have exactly the same chance of winning and the winner selection process must be designed to achieve that.
- It must be made clear to viewers when the competition closes and whether or not entries received after this time will (a) be entered and (b) be charged. Full allowance must be made for SMS latency and Red Button connection issues.
- No steps at all, including the creation of a short-list, must be taken before the stated time at which entries will no

longer be accepted (unless it is clear that participants will be selected on an on-going basis, for example, in Call TV quiz services) and after the allowance of an additional time calculated to enable all entries to be aggregated and a winner chosen.

- Ample time, calculated to enable all entries to be aggregated, must be given to process all correct entries between the stated closing time and the announcement of the winner. Provision must be made for the occurrence of technical or other problems which may delay or prevent the announcement of a result.
- Viewers must not be told a programme or item is live if that is not the case.
- The names of winners announced must accurately reflect the true result. "Winners" must never be faked.
- Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known. The competition must be run exactly in accordance with its terms and conditions.
- Cryptic or complicated solutions must not be described as simple.
- Prizes should be delivered to winners within 28 days of the competition closing date. Prizes which cannot be delivered within this time should generally not be offered.
- Prizes aimed at children must be appropriate to the age range of both the target audience and the participants. If the prize is cash, then entrants must be at least 16 years of age and this condition of entry brought to potential entrants' attention.
- References to brands within competitions must be brief and secondary.
- Legal advice should be sought to ensure

the competition complies with the new provisions of the Gambling Act 2005 which came into force on 1 September 2007.

● See Chapter 4H, Editorial Independence & Commercial References within Programmes – ‘Products and Services within Programmes – Competitions’

VOTING

- All votes must be treated in a fair and consistent manner, regardless of the means by which they were sent.
- It must be made clear to viewers when counts will be taken and whether or not votes after this time will (a) count and (b) be charged. Full allowance must be made for SMS latency and Red Button connection issues.
- Ample time, calculated to enable all votes to be aggregated, must be given to process all votes between the stated closing time and the announcement of the result. Provision must be made for the occurrence of technical or other problems which may render a vote incomplete, thus delaying or preventing the announcement of a result.
- The result which is announced must accurately reflect the actual proportions of votes received.

From 1st August 2008 Ofcom requires all on air premium rate competitions and votes to be subject to third party verification. This system of verification is the responsibility of a broadcaster but may require some information, if requested, from a production company. Please speak with the relevant broadcaster if you have any queries relating to this.

VIEWER COMMENTS, MESSAGES AND CONTENT SELECTION

- All responses must be treated in a fair and consistent manner with all other responses received, regardless of the route of sending.
- It must be made clear to viewers whether all messages will be shown on-screen and, if not, how they will be selected for transmission.
- It should also be made clear that messages may be edited before transmission.
- Procedures must be in place to cease promotion of any PRS message, comment, or content selection route where a technical problem occurs.
- All content selection must accurately reflect the actual responses received unless viewers are clearly told otherwise.

PROGRAMME CONTRIBUTOR SOLICITS

- All responses must be treated in a fair and consistent manner with all other responses received, regardless of the route of sending.
- Consideration must be given to the length of time during which solicits will be accepted, bearing in mind the programme may be repeated for months or years to come. Under no circumstances may a premium rate number be promoted or the line left open after the active consideration of responses has ceased.
- Viewers must not be led into believing all responses will be pursued if that is not the case.

● On Channel 4, programme contributor solicits in programmes must not invite responses through PRS. On Five, this must not be done without the prior approval of the commissioning editor.

● Appropriate terms and conditions which explain how responses to solicitors will be processed should be agreed with the broadcaster and published on the broadcaster’s website.

REPEATS

● It must be made clear to viewers where a repeated broadcast of a closed competition, vote, or programme inviting viewer interactivity or response is being transmitted that a response must not be attempted. As best practice, only to be deviated from in exceptional circumstances after advice has been sought, the relevant numbers should be obscured using an on-screen graphic.

CUSTOMER CARE

- Winners’ names should, as best practice, be published on a relevant website and, at the very least, be available to anyone who requests them, for 3 months of the competition closing date.
- Adequate provision must be made to deal with enquiries from participants regarding the sending, delivery, receipt, processing and treatment of any entry, vote, or use they make of any PRS.
- The broadcaster’s viewer enquiries department should be notified of the details of all promotion of any PRS and should be given sufficient information to enable it to respond effectively to viewer enquiries regarding the service.

7 CHANNEL 4 APPENDICES

7A. VIEWER TRUST GUIDELINES

RULES AND PROCEDURES FOR BEST PRACTICE & COMPLIANCE

The Executive Producer (or Series/ Programme Producer where there is no Executive Producer) for each Channel 4 programme is responsible for ensuring that this document is circulated to every member of the production team and that every team member follows the procedures and guidance it contains.

We hope these guidelines are helpful but they are only a general guide which cannot foresee every scenario - different cases will depend on their individual facts. If you are in any doubt, or if you have any concerns, please seek advice from your Channel 4 Commissioning Editor or Programme Lawyer.

1. INTRODUCTION

Channel 4 has faith in the honesty and integrity of our programme-makers and, in the overwhelming majority of cases, that faith is justified.

Channel 4 has a bond of trust with its audience and a duty to ensure that viewers are not deceived or misled by our programmes. This bond must not be broken and, if it is, the most serious consequences will follow. Channel 4 will not hesitate to take appropriate action against production companies and programme-makers who deceive our viewers and/or the Channel and this may include refusing to work with them.

Programme-makers must never stage, construct, reconstruct, re-enact or otherwise fake any scenes of actuality and pass them off to viewers or to Channel 4 as the real thing.

2. THE RESPONSIBILITIES OF BROADCASTERS AND PROGRAMME-MAKERS

The mistake should not be made of believing that the importance of viewer trust is limited to current affairs, documentaries or conventional factual programmes. Simply because a programme is primarily designed to entertain or is 'formatted' does not mean that there is a licence to mislead the audience. Our viewers are entitled to respect and that means they must feel confident that they can take what they see or are told in a programme at face value. The nature of the commissioning department is not the issue, for example these guidelines apply equally to an entertainment show with factual elements, even if it has been commissioned by the Entertainment Department.

The use of a dramatic reconstruction, sometimes involving real people rather than actors, is a perfectly acceptable technique, provided viewers are not misled and clearly understand or are informed, for instance, by labelling on screen or in voice over, the true nature of what they are seeing. However, reconstructions must not distort the known facts. Contributors to our programmes are real people and should not be used like actors. Viewers deserve to be informed and entertained, not deceived.

At the heart of the commissioning system, which is central to Channel 4's broadcasting remit, is the relationship between the commissioning team and independent producers. To be effective, and to achieve the highest quality programmes, the relationship must operate with honesty, openness and trust. It is important that the commissioning process does not act as a disincentive to programme-makers at any level, inhibiting them from telling Channel 4 if a project is not working.

In addition, it is important that everyone involved in the programme, whether at the production company or the Channel, avoids, even inadvertently, making anyone involved in the production feel they are under pressure to deliver 'results' or to 'hype' the story at the expense of the truth. If anyone on the production team has any concerns about a viewer trust issue they should refer this up immediately to a senior person at the production company and if the concerns are justified Channel 4 must be promptly informed.

Channel 4 will have far more respect for and trust in any member of a programme team who is prepared openly to identify problems in the production or development stages of a programme than an individual who chooses to conceal such problems. More often than not, problems or issues brought to the Channel's attention can be resolved and the commission can proceed, albeit in a different direction to that originally envisaged. On many occasions, it may be simply a case of labelling material and explaining to the viewer that there is an element of legitimate artifice. This could include a pre-broadcast announcement, a line of commentary or an on-screen caption.

On rare occasions, halting a project which is not working out (perhaps because the story does not stand up) is the right course of action; **inventing the story is never an option and "the show must go on" is not an excuse.**

3. VIEWER TRUST

Since the early days of factual film-making the making of programmes has always been more sophisticated than the simple recording of action in real time. It is a creative, rather than literal, medium, often reflecting the style of the film-maker in a similar way to a writer. The structuring and compression of experience is inherent in the making of a programme. However, though the editing process will inevitably

condense events which have occurred over a period of time, this must not be at the expense of distorting reality and misleading viewers. **The truth must not be sacrificed for the sake of a more entertaining programme if this means cheating the viewer. It is never acceptable to represent something as having happened that did not.** It is the responsibility of broadcasters and producers not to confuse the aesthetic and structural issues of a programme from the issues of truth and falsehood. In order not to mislead viewers programmes should be clear in their intent.

Viewer trust and the truthfulness of television programmes have become the subject of significant media and regulatory scrutiny and raise issues of the utmost importance. **Viewers must not be misled about the nature of material they are watching. If it is claimed or suggested that footage is actuality, then that is what it should be; if it is not, then that MUST be made clear to viewers. Ofcom will not hesitate to impose the most serious sanctions, including substantial fines, for failure to ensure that programmes are accurate and truthful or where viewer trust is breached.**

4. COMPLIANCE AND THE GUIDELINES

Compliance for a programme must be a shared and collaborative process between the broadcaster and the production company. Although Channel 4 is ultimately accountable to Ofcom for compliance with the Ofcom Broadcasting Code ("the Ofcom Code"), we expect all our programme-makers (from the most junior to the most senior) to have read and to comply with its provisions and with all our rules and guidelines on best practice, including these guidelines. Channel 4 has been working in partnership with Five to produce a comprehensive guide to the legal and regulatory rules governing the

making and broadcast of programmes, the Independent Producers' Handbook ("the Handbook"). Once the Handbook is published in autumn 2007 all our programme-makers will be expected to have read and to follow its provisions when making programmes for us. Until then producers should refer where necessary to the Channel 4 Compliance Manual (which, although it is being updated, contains helpful rules and guidance on best practice) to supplement the Ofcom Code and Ofcom's accompanying guidance.

The Ofcom Code can be found at: <http://www.ofcom.org.uk/tv/ifi/codes/bcode/ofcom-broadcasting-code.pdf>

Ofcom's Guidance on the Code (updated from time to time) can be found at: <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/>

In addition, for many programme series, areas of programme making and programme genres Channel 4 has bespoke guidelines and protocols. All of these documents are available from the Legal & Compliance Department at Channel 4 and many are available on the 4producers website. These include best practice rules for Secret Filming, making Current Affairs Programmes, Fairness to Contributors and Filming in Hostile Environments.

Like all best practice documents these Viewer Trust Guidelines identify important areas but do not replace the Ofcom Code and guidance or the Handbook/Compliance Manual. These guidelines must be read and followed by everyone working on a programme for Channel 4 and before a programme goes into production.

Additional guidelines (updating the Factual Programmes Rules) will be circulated in due course setting out the key ground rules relevant to factual

programme-making and summarising existing procedures and practice for Channel 4's factual programmes.

The remainder of this document sets out further practical steps and guidance concerning Viewer Trust.

5. PRACTICAL STEPS TO ENSURE TRUTH AND ACCURACY IN PROGRAMMES

i. The Production Team

It is the responsibility of the Executive Producer (or most senior production executive) on every programme to ensure that:

- The entire production team is adequately staffed and resourced to deal with the demands of the programme concerned – including training, experience and supervision. Any trainees or interns must be closely monitored, especially if they are dealing direct with any members of the public, including contributors.
- The production team is aware of the importance of compliance with these guidelines, the Ofcom Code and the Handbook/Compliance Manual.
- The production team is adequately supervised at a senior level in the production company.
- The production company has in place effective procedures to ensure that any concerns about viewer trust, programme veracity or any other important issue is escalated swiftly within the team to the Executive Producer and then to Channel 4 as expeditiously as possible and that these are communicated to and understood by the team.

● When a decision is made on a viewer trust issue it is clearly communicated to and understood by the production team.

The Commissioning Editor should obtain the Executive Producer's assurance that the above provisions are complied with.

ii. What is Acceptable Practice?

Many established programme-making techniques are unproblematic and viewers would not find them surprising or troubling. For example, the use of a cutaway shot, 'noddy' or a 'set up' shot to establish an interviewee. Often, a contributor might legitimately be asked to repeat an *insignificant* action, e.g. to walk into a room again, shake hands with the presenter or to do for the camera what they do normally or a brief 'pick up' shot of their interview to assist editing. Contributors should not be asked to repeat or re-enact *significant* actions or events, e.g. to re-enact a row with their partner because the director didn't like the camera angle when it originally happened or because it wasn't being filmed, unless this is clearly sign-posted to the viewer, e.g. by calling it a 'reconstruction'.

People may behave differently when they know they are being filmed, although many will relax when they get used to the cameras. You must not, however, deliberately provoke or encourage behaviour which would not have occurred naturally, without making it clear to the audience that you have done so.

The broad distinction is this: it is not acceptable to incite someone to take or recreate an action which will have a bearing on the outcome of the programme's narrative and to present this action as something of significance observed as it happened on camera (even if it is something which actually happened in the past). This is an unacceptable intervention which is entirely different to the legitimate creation of a filmed sequence representing

insignificant everyday activity which has no bearing on the outcome of the programme's narrative.

Stylised Documentaries

Inevitably, there are areas of ambiguity including occasions where the style and idiom of the film is intentionally heightened. This is often the case in deliberately light-hearted films. An obviously stylised documentary might be visually inventive, for example, filming shots of the same thing from several camera angles and intercutting them. But there is a world of difference between an imaginative film where the audience understands the nature of what it is they are seeing and methods which mislead the audience, and claim evidential validation of a sequence which would not have happened without the intervention of the programme-maker.

The artifice of such imaginative documentaries is unproblematic, so long as it is clear that they do not seek to misrepresent contrivance as observed actuality. It is legitimate to innovate and take creative risks. There is, however, a duty to be clear about the terms on which we engage a programme's participants and its viewers and to ensure that the viewers are clear about what they are watching and that they are not misled.

Chronology and the Compression of Time

The compression of time is a common programme-making technique and will generally be unproblematic. However, where the programme narrative places emphasis on the importance of a strict timescale, care needs to be taken not to mislead the audience. For example, where a contributor is shown achieving a goal within record time, when in fact it took him several attempts over a prolonged period, this should be made clear to the viewer. In addition, it may not always be

necessary to reflect the actual chronology of events strictly where this is not material to the narrative but if events appear out of sequence, e.g. to tell the story more clearly, this must not mislead viewers. Inevitably there will be occasions when a fine judgement will need to be taken as to where the line is drawn but the cardinal rule is that when in doubt ask the question and refer up to senior staff and Channel 4.

Viewer Information

Viewers are now more media literate than ever and they will understand many conventions of television, but they must be equipped, by appropriate sign-posting, to properly understand and make an informed judgement about what they are watching. Sometimes it may involve simply being upfront about the techniques used. The proposition of a programme and its genre will dictate what is acceptable and what the audience needs to be told. In an undercover investigation it should, for example, be clear when any footage is not shot covertly. On the other hand, a history programme will use archive and stylised reconstructions of events, at least some of which will self-evidently not be contemporaneous or real. Viewers generally expect that in entertainment programming some degree of artifice is legitimate for comic effect. However, this does not mean that 'anything goes' and audience expectations will vary from programme to programme.

Reference-up

Tell your Commissioning Editor anything he/she should know about the provenance or authenticity of any footage, including techniques used to get it, so that a judgement can be made about whether to include it and, if so, whether any sign-posting is necessary for the viewer. Take advice as appropriate from the Legal & Compliance Department. We have an equal responsibility for footage obtained from a third party

as footage we shot ourselves. Your programme must be truthful, accurate and fair. Use your common sense and good judgement. If you have distorted reality and the viewer has been misled, you have crossed the line of acceptability.

iii. Fact-checking and Accuracy

A corner stone of maintaining viewer trust is ensuring that programmes are factually accurate. You must have checked all facts and allegations in your programmes and be able to substantiate their accuracy, as appropriate. This includes claims by interviewees which may sometimes need to be corroborated.

If an interviewee makes a damaging allegation about a third party, ask yourself "why?" Could they have an improper motive or a hidden agenda? Would they make a good and willing witness if the allegation is challenged? Can you substantiate what they are saying by any other evidential means – such as documentary evidence?

iv. Editing Interviews

As well as not misleading the viewer, it is vital that interviews and other contributions, including observational filming, are edited fairly and that you do not distort or misrepresent the person's known views, position or experience. Many programmes, especially in 'life style' and 'formatted documentary' genres, are driven by the strong, sometimes colourful, characters that feature in them and the audience enjoys sharing their journey or transformation. However, in representing characters and their journey in order to tell their experience in an interesting and entertaining way, care must be taken not to distort the truth and mislead viewers or be unfair to the contributor.

v. Hoaxes

Members of the public have been the subject of hoaxes by programme-makers

since programmes like Candid Camera started. Hoaxing has become increasingly sophisticated as technology has developed, and so has the viewing audience. Sometimes the tables are turned. **Look out for signs that you may have been hoaxed by a contributor.** Their motive may only be to attain their 15 minutes of fame. Hoaxers can be very convincing. Don't take everything at face value – make appropriate checks to establish whether people are who they say they are and whether they have done what they claim to have done. If it seems too good to be true perhaps it is. Make further enquiries as to their authenticity to ensure that you, and consequently Channel 4 and the viewer, have not been fooled.

If you are in any doubt about any of your contributors or what they are saying you must share your concerns with your Commissioning Editor at the earliest possible opportunity.

vi. Filming Criminals or Criminal Behaviour

This is an area fraught with difficulty and can lead to authenticity problems. If people talk about their crimes openly or are prepared to let you film them carry out an apparently criminal act you must tell your Commissioning Editor and a Channel 4 Programme Lawyer straight away and get advice.

Someone admitting to or carrying out a criminal act could well be prosecuted after transmission and your footage could be obtained by the police under a court order. Ask yourself why they are doing it if they are incriminating themselves. Do they understand the consequences? Or are they trying to have you on? Remember criminals tend not to be truthful and they will have a vested interest for their own self-preservation to deny it if challenged later.

Some other rules:-

- No material may incite or encourage crime or lead to disorder.
- Avoid demonstrating criminal techniques like precisely how to make a bomb or steal a car.
- You must be scrupulous to avoid a charge of incitement or aiding and abetting any criminal behaviour.
- Avoid creating the impression of condoning or glamorising criminal behaviour.
- You must make a careful distinction between observation and participation and keep at 'arm's length' e.g. do not drive a criminal to a place where they have indicated they may commit a crime.
- You must never provoke or encourage behaviour which would not otherwise have occurred.
- If you reconstruct a crime (with real people or with actors) it must be accurate and fair and it must be clearly sign-posted as a reconstruction, e.g. by an on-screen 'reconstruction' caption.
- No one must be put at unnecessary risk of harm – you, your team or the people you are filming.
- It is generally unacceptable to make a payment to a criminal other than in specific circumstances permitted by the law and the Code.
- Drug abuse must not be portrayed as problem-free or glamorous.
- Early legal advice from Channel 4's Legal and Compliance Department must be obtained before filming or as soon as reasonably practicable.

6. THE ROLE OF THE LEGAL & COMPLIANCE DEPARTMENT

Compliance is a shared responsibility between the broadcaster's editorial teams and the programme-makers, with appropriate and timely advice from the Legal & Compliance Department. Channel 4 has an experienced and highly skilled

team of Programme Lawyers dedicated to getting our programmes on the air within the parameters of the law and the Ofcom Code and defending them after broadcast. Help them to help you by seeking advice at an early stage and throughout your project and by being candid with them and your Commissioning Editor about any issues which may mislead viewers so that they can be addressed promptly.

The Programme Lawyers advise on all Ofcom Code and media law issues relating to programme content, including, libel, contempt and privacy. If you need advice and you don't know who the Programme Lawyer is for your programme please ask your Commissioning Editor or call the Legal & Compliance Department direct. Channel 4 operates a Duty Lawyer system for programme advice out of hours. You can get advice 24/7 from the Duty Lawyer if your problem is urgent. The Duty Lawyer's contact details can be obtained from the Viewer Enquiries Department on the main Channel 4 telephone number.

If you are unclear about anything in this document please seek advice from your Commissioning Editor and/or, as appropriate, a member of the Channel's Legal & Compliance Department.

Channel 4 Television Corporation
August 2007

7B. LIVE PROGRAMME PROCEDURES

AUGUST 2007

INTRODUCTION

Live programmes play an important role in the Channel's output. By their nature, live programmes are inevitably unpredictable, which is one of the reasons they are enjoyed by audiences. However, there must be appropriate and effective procedures and training to avoid problems arising during broadcast and to deal with them promptly if they do arise. These procedures set out the issues that should be considered prior to, during and after broadcast.

1. PRIOR TO BROADCAST

1.1 Commissioning Editors and Producers should discuss **at an early stage** arrangements for all live broadcasts.

The following must be considered:

- Ensuring the **presenters** selected are equipped to handle the particular demands of the live show they are presenting. This may also include arranging for the presenter to have a separate briefing by the Commissioning Editor and Programme Lawyer. This is particularly important if the presenter has had little or no live programme presenting experience or, for example, has limited experience of pre-watershed programmes.
- Discussing the programme format with a member of the **Legal and Compliance** Department well in advance of transmission to ensure that any issues can be addressed. This includes advising whether the broadcast is to be pre-watershed or post-watershed and discussing any programme material, items and/or potential guests that may be problematic or contentious.
- If there is intended to be any use of **premium rate services** (telephone, text, red button) in connection with the programme, this must be fully discussed with and agreed by the Channel 4 staff

member responsible for arranging such services, and advice sought from the Legal and Compliance Department as necessary. Key considerations will include having contingency plans in place detailing what will be done if/when technology fails, and arrangements for close tripartite liaison between Channel 4, the production company and the premium rate service provider.

- Ensuring all members of the **production team are adequately briefed** by a member of the Legal & Compliance Department/ Programme Lawyer on legal and compliance issues relevant to the programme. This may also include working with the Programme Lawyer to compile Legal & Compliance Guidelines and attending any briefing to the production team (see below).

- Making arrangements for the Programme Lawyer to attend the live recording if necessary or if not, ensuring that the Programme Lawyer is contactable by telephone and that the Programme Lawyer has contact details, including the Studio Gallery numbers.

1.2 **Legal and Compliance Guidelines** may be prepared where appropriate, in liaison with the Commissioning Editor and production company. The Guidelines will set out any **procedures for compliance** both before transmission and during transmission, especially those concerning the provision of any **advance information** by the production company to the Commissioning Editor and Programme Lawyer about guests, subjects for discussion and other proposed content, including material and items appropriate for the transmission time and the 'Live Programme Procedures' including the 'Apologies Procedures' set out below.

1.3 The Commissioning Editor should ensure that any particularly difficult items, subjects or guests are **referred-up** in advance to their Editorial Head and/or,

if appropriate, to the Channel Head and Director of Programmes & Content.

1.4 Prior to broadcast, the Commissioning Editor should consider with advice from the Programme Lawyer whether the content or likely content of the live programmes means that an on air a **warning or flagging** is required, e.g. for strong language; adult humour; flashing images etc. The Commissioning Editor should then make the necessary arrangements including ensuring that the Presentation duty desk and announcers are aware that a warning is necessary and what the wording for the warning should be.

2. DURING AND AFTER BROADCAST

2.1 The Commissioning Editor or their designate must be **present** at all live broadcasts or, if more appropriate, view the programme as it is broadcast and be available on a designated telephone link to the producer, the Programme Lawyer and Presentation. There are some exceptions to these requirements, for example, the coverage of live sports events.

2.2 The Commissioning Editor and Producer must ensure there is **effective communication** between the Producer, the Programme Lawyer, the Commissioning Editor (and if appropriate, the premium rate service provider) and the studio floor to deal with any problems during broadcast. If the presenter will not be wearing an earpiece, another effective system must be set up to communicate with the presenter.

2.3 If a potential code breach or other significant incident arises during a live broadcast, e.g. the 'f'-word is broadcast before the watershed, the '**Apologies Procedure**' below must be followed as appropriate and upon the immediate advice of the Commissioning Editor and Programme Lawyer. Following

transmission, the Commissioning Editor (in consultation with the Programme Lawyer) must as soon as reasonably possible, and within 24 hours, debrief the programme makers and **write up a full report** of the incident for their Editorial Head, the Channel Head and Director of Programmes & Content.

2.4 In circumstances where the live programme is to be repeated almost immediately in a "+1" **hour time-shifted broadcast** service, the Commissioning Editor is responsible for ensuring that they have read and complied with the additional procedures laid down in that Channel's Editorial and Compliance Protocol. These procedures include:

- Ensuring that any live programmes relying on premium rate telephone services (e.g. a viewer competition, voting line or call to action) which close within the programme or within an hour of the live programme, make clear to viewers watching the '+1' service that the phone lines are not available. This will involve making sure that the live programme includes a prominent caption on-screen that the phone lines are not available on the '+1' service.

- Ensuring that in the event of a potentially serious legal issue, e.g. a libellous statement made by a guest in a live show or a potentially serious breach of the Ofcom Broadcasting Code, e.g. the impromptu use of strong language in a live pre-watershed programme, that the emergency take down procedure is followed. The procedure enables an on-screen caption to be put up to cover the offending sequence (both picture and audio). All of these procedures must be discussed with and approved by the Programme Lawyer.

2.5 In respect of any repeat broadcasts of that live programme on that channel or

any sister channel, other than a '+1' service, the Commissioning Editor is responsible for putting in place procedures to enable the removal or obscuring of material from the live broadcast which gives rise to serious legal or compliance concerns in the repeat broadcast. For example, a libellous statement made by a guest or the use of strong language which would not be acceptable if the programme was repeated pre-watershed. Particular care must be taken where any premium rate telephone service is no longer open. In such cases the Commissioning Editor must ensure that the details of the premium rate services are edited out of the programme and/or the programme contains a clear caption that the telephone lines are now closed. All of these procedures must be discussed with and approved by the Programme Lawyer.

2.6 Where a programme is recorded and broadcast '**as live**' with a short delay there must be appropriate and effective procedures to address by way of editing (e.g. bleeps or dips in sound) any compliance concerns, particularly if the purpose of the delay is to deal with a potential compliance issue – e.g. the risk of strong language in a pre-watershed programme. The delay must be adequate to deal with anticipated problems. There are special technical arrangements required for 'live streaming' which should be discussed with the Legal & Compliance Department.

3. APOLOGIES PROCEDURE

Each incident will be different so hard and fast rules would not be practical, but the following procedures should be followed unless circumstances and common sense clearly indicate they are inappropriate:

3.1 On the advice of the Programme Lawyer, **any potential libel problem**

should be dealt with immediately. This may include a statement distancing the programme and the broadcaster from a libellous remark and apologising if necessary. The presenters must not make any further reference to the libellous remark in the programme.

3.2 If an **inappropriately offensive remark** is made, the presenter should attempt to diffuse the situation and distance the programme and the broadcaster from the remark. He or she should endeavour to apologise to viewers immediately. In the heat of the moment with a difficult guest this can be risky and should only be done immediately if it is felt it will not cause further problems.

3.3 In the event of the use of **strong language** (the 'f'-word, 'c'-word or their derivatives) **pre-watershed** an on-air apology must be made by the presenter at the earliest opportunity. Consideration must be given by the Commissioning Editor and Programme Lawyer to whether a **further apology** by Presentation at the end of the programme is appropriate. If the presenter has failed to apologise, or the opportunity has passed, there must be a presentation apology immediately after the programme.

3.4 If the Commissioning Editor and the Programme Lawyer consider that an **on-air apology at the end of the programme** is appropriate (under either 3.2 or 3.3 above) they can authorise an apology. A senior editorial executive should be informed as soon as possible thereafter by the Commissioning Editor.

3.5 **If it is agreed that there should be an apology** then Presentation should make a simple apology directly following the transmission, for example, saying "*apologies for the unexpected strong language in the last programme*".

3.6 An offensive or libellous remark which caused concern on transmission should be edited from any **repeat, including VOD** and/or an entry made on the appropriate system alerting users that the programme cannot be repeated without the requisite edit being made.

Channel 4 Television
August 2007

7C. RULES OF PRACTICE AND PROCEDURE FOR SECRET FILMING AND RECORDING FOR CHANNEL 4 PROGRAMMES NOVEMBER 2005

RULES OF PRACTICE AND PROCEDURE FOR SECRET FILMING AND RECORDING ON CHANNEL 4 PROGRAMMES

1. INTRODUCTION

Surreptitious, or secret, filming and recording are powerful journalistic tools. Material obtained covertly may be the only independent account of the wrongdoing it captures. Secretly filmed or recorded exposés have led to the revision of working practices, changes in the law, the closure of institutions and have even sent criminals to prison. Advances in technology have enabled a degree of infiltration previously unheard of.

As a powerful tool which is capable of invading individuals' privacy secret filming must be handled with due responsibility. Covert filming and recording is not just another programme technique and must be handled in accordance with best journalistic practice. Law-abiding individuals who have done nothing wrong are entitled to have their privacy respected. The right to privacy can only be overridden where the public interest outweighs it and any infringement of privacy must be warranted and proportionate.

Channel 4 has drawn up these rules of practice to ensure that the secret filming and recording carried out on our programmes is in accordance with the Ofcom Broadcasting Code ("the Code") and in order to maintain the highest journalistic standards.

After transmission of a programme, footage obtained covertly may become evidence in a criminal prosecution, in a libel or privacy action or in an Ofcom investigation. The way in which the footage is obtained must not, therefore,

be open to criticism as to its authenticity or for the methods used to obtain it. In addition, Channel 4's reputation depends on its viewers being able to trust that what they see is true and justified.

This document must be copied to all members of your production team and it is the responsibility of the executive producer and the producer to ensure that its provisions are carefully read, understood and followed by all team members.

This document refers throughout to secret filming but the rules apply equally to secret audio recording for the purpose of broadcast. Secret filming covers not just the use of covert camera technology but also certain situations where the subject does not realise they are being filmed, including when they may believe the camera is switched off.

The Code defines "surreptitious filming or recording" as follows:

"Surreptitious filming or recording includes the use of long lenses or recording devices, as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording telephone conversations without the knowledge of the other party, or deliberately continuing a recording when the other party thinks that it has come to an end."

2. PROCEDURE BEFORE UNDERTAKING SECRET FILMING

Secret filming requires careful consideration and must be approved by Channel 4 in advance and in writing before the filming/recording is carried out (Stage I) and before it is broadcast (Stage II). This

requirement will only be waived in exceptional circumstances. Please tell Channel 4 in good time of any plans to film secretly, preferably at least three working days in advance, so that the approval process is not delayed. Last minute requests run the risk of being rejected if there is no good reason for the delay in submitting them.

You should take the following steps: -

- Consider how your proposals will meet the requirements of Section 8.13 of the Code which says that the material acquired through secret filming must be "necessary to the credibility and authenticity" of a story which must itself be "prima facie in the public interest". In addition there must be "reasonable grounds to suspect that further material evidence could be obtained" by secret filming/recording.
- Discuss your plans with your Commissioning Editor and with the Channel 4 lawyer advising on your programme. If you do not know who your assigned lawyer is, ask your Commissioning Editor.
- Make a detailed written request to the Commissioning Editor, copied to the lawyer, setting out your proposals including:
 - Who will be operating the equipment and who will accompany them?
 - What equipment will be used and where will the secret camera(s) be placed, e.g. in a jacket or in a bag?
 - The subject(s) of the secret filming (i.e. the person/people/locations to be secretly filmed).
 - The proposed circumstances of the secret filming.
 - The reason you think it complies with the test under Section 8.13 – what evidence is there of wrong doing, why can't the footage be obtained conventionally and why is there a public interest to the story? A public interest is

not simply something of interest to the public. Your case must be logically argued.

- What is the proposed cover story for the secret cameraperson and their companion(s)?
- What arrangements have been made for their safety, where appropriate?
- Make arrangements for the undercover reporter to be briefed by a Commissioning Editor and Channel 4 Lawyer and, wherever possible, the Controller of Legal & Compliance before undertaking the secret filming.

An outline pro forma Stage I application which you should follow and complete is attached. Each new request should be numbered sequentially.

You must notify Channel 4 in writing, beforehand if possible, of each new secretly filmed encounter even if it is already covered by an existing secret filming approval.

3. PROCEDURE FOR OBTAINING APPROVAL AT CHANNEL 4

- Your Commissioning Editor will discuss your proposals with the Channel 4 lawyer and with his/her Editorial Head, where appropriate. Once satisfied, the Commissioning Editor is responsible for making a written application to the Head of News & Current Affairs, or her appointee in her absence, for written approval. The Stage I application, before it is approved and once it has been approved must be copied to the lawyer advising and the Controller of Legal & Compliance if different.
- The Stage 1 application must first be approved by the lawyer and the Controller of Legal & Compliance (if different). Your Commissioning Editor will tell you when approval has been granted or if your

application has been turned down. In the latter case you may be required to provide more information or satisfy any concerns raised.

4. RESPONSIBILITIES OF THE PRODUCER ONCE SECRET FILMING HAS BEEN APPROVED BY CHANNEL 4

- There must be set up an adequate logging system for secretly filmed rushes which shows:
 - The date and time of filming
 - The place
 - Who was filmed and who was present with the secret camera person
 - When the rushes were received at the production company
 - When they were viewed by the producer and any other production personnel.

Channel 4 may wish to see rushes and/or accurate transcripts at any time during production, before transmission and after transmission, in the event of any legal or regulatory issue arising.

Original secretly filmed rushes and the logging system must be preserved for at least eighteen months from the date of the programme's transmission or longer if required by Channel 4.

- Producers are directly responsible for logging and viewing all the secretly filmed rushes as soon as reasonably practicable, ideally no later than 24-48 hours after they are delivered to the production company.
- The Executive Producer, if there is one, is responsible for ensuring that he/she has viewed all necessary secretly filmed rushes, depending on the nature of the project and production personnel.
- The Producer (and Executive Producer

where applicable) are responsible for telling the Commissioning Editor and/or the Channel 4 lawyer promptly of any matter of concern of which he/she becomes aware. This includes:

- Any inappropriate behaviour by the secret cameraperson and/or their companions, for example, any attempt to provoke or improperly entrap the subject(s)
- Any matter suggesting someone's safety was put at risk (including the subjects of the secret filming)
- Any matter which suggests that the footage is not authentic
- Any matter which could have a bearing on the direction of the story and the content of the film.
- No further secret filming should take place until the rushes of the previous secret filming have been checked by the Producer, unless there is a compelling reason why this cannot be done.

5. RULES OF CONDUCT FOR SECRET CAMERA OPERATORS

- The Producer (and Executive Producer, where applicable) are individually and directly responsible for the conduct of the secret cameraperson and anyone accompanying him/her undercover and for making them aware before filming commences that they:
 - Must remember that whatever they say once the camera is running may one day be heard by the subjects of the covert filming. They must, therefore, be sensible about what they say and how they behave before and after the filming of the subject(s).
 - Are required to keep a detailed diary of their secret filming and all other meetings/conversations with the subject(s). This will form a contemporaneous record of their dealings with the subject(s) and/or a

valuable evidential record if the camera fails.

- Must agree their cover story with the producer and Channel 4 beforehand. The level of any deception must be proportionate.

- A secret cameraperson and anyone who accompanies them undercover will usually be playing a role which goes well beyond simple observation. In the process of interacting with the secretly filmed subject(s) care must be taken to ensure that wherever possible the secret camera operator avoids encouraging conduct which might not have occurred at all but for their intervention. A careful line must be trodden to avoid a subsequent accusation of improper entrapment.

- If a subject becomes aware they have been secretly filmed, Channel 4 must be notified as soon as reasonably practicable.

- If any payment is made by the secret cameraperson or their companions to someone secretly filmed this payment should be referred to Channel 4, and, if possible, approved in advance. Such a payment may affect the credibility of that person and we may decide it is necessary to inform viewers about it.

- Our reputation for strong journalism is retained through honest, accurate and fair reporting. On no account must a secret cameraperson or anyone undercover construct, reconstruct or otherwise fabricate scenes and pass them off as if they really happened. No filming which could have taken place openly should be passed off as secret. Any scenes which reconstruct or re-enact real events, even with the real people involved, must be clearly labelled in the programme to avoid confusion on the part of the viewer.

No one should ever feel under pressure to "get the story". We would rather not broadcast at all than broadcast something that is untrue.

6. SUPERVISION OF SECRET FILMING BY THE PRODUCER

- The producer must ensure that:

- All members of the production team have received a copy of this document and have read and understood its terms and that its terms are followed.
- The person secretly filming is able to take on the tasks and responsibilities required of them. He/she must be familiar with the operation of the equipment and the risks involved. The safety of those undercover, and in many cases those with whom they interact, is paramount.
- The undercover reporter has been briefed by a Commissioning Editor and Channel 4 Lawyer and, wherever possible, the Controller of Legal & Compliance before undertaking the secret filming.
- He/she adequately supervises the secret cameraperson throughout their research as well as throughout the undercover operation.
- If the secret cameraperson is not an experienced television journalist, before secret filming commences, Channel 4 is likely to require to see and approve:

- A police check on whether he or she has any previous convictions, if considered appropriate
- A detailed CV
- References, as appropriate
- A written report on any existing relationship between the secret cameraperson and the proposed subjects of the secret filming
- The proposed CV and details of referees for the undercover role, where applicable.

These must be sent to the Commissioning Editor and Channel 4 lawyer.

● If it is thought appropriate, even if the secret cameraperson is an experienced television journalist, Channel 4 may well require him or her to undergo a police check on their previous convictions if the undercover operation is likely to involve him/her in the technical commission of a criminal offence, for example buying drugs or handling stolen goods.

In the event that the journalistic purpose might involve the technical commission of a criminal offence, albeit without criminal intent, early advice should be obtained from the Channel 4 Legal and Compliance Department on the specific procedures, which should be followed. A clear public interest case will have to be made out. The physical evidence obtained may well form the basis of a subsequent prosecution of the individuals whose criminality has been exposed and will need to be the subject of an appropriate protocol to ensure its integrity is preserved as far as reasonably possible.

7. UNDERCOVER IN AN ORGANISATION OR COMPANY

● If the secret camera operator or other person going undercover is to be obtaining a position as an employee or similar position in a company or organisation, specific advice must be sought from the Legal and Compliance Department beforehand. In particular, the following rules must be followed:

- Any remuneration received from the company/organisation must be paid into an account set up for that purpose.
- The secret cameraperson must not purport to have qualifications or experience which he/she does not have where this might put them or others at risk or lead to legal problems.
- Channel 4's Legal and Compliance Department must be consulted before application forms for such positions are

filled in, letters and emails written etc.

● Channel 4 must see and approve the proposed CV and details of referees for the undercover role.

8. PROCEDURE FOR APPROVAL OF THE SECRET FILMING BEFORE TRANSMISSION

● Your Commissioning Editor is required to seek prior approval in writing from the Head of News & Current Affairs or her appointee (who may be the Controller of Legal & Compliance) to broadcast material obtained by secret filming or recording. This includes material filmed/recorded surreptitiously or covertly by third parties. This is called a 'Stage II' request and the material for broadcast must satisfy the requirements of Section 8.13 and 8.14 of the Code i.e. it must be "necessary to the credibility and authenticity" of a story which must itself be "prima facie in the public interest".

● Before approval is sought the application must have been seen and approved by the Controller of Legal & Compliance or one of her deputies if she is unavailable. The secretly filmed material may raise other editorial, legal or compliance issues. These will be discussed with you at rough and fine cut viewings.

● The Stage II, before it is approved and once it has been approved must be copied to the lawyer advising and the Controller of Legal & Compliance if different.

A pro-forma Stage II application is attached.

9. AFTER TRANSMISSION

● If the secret filming has revealed the commission of a criminal offence by the

subject(s) of the secret filming, Channel 4 may volunteer the secretly filmed footage and other material to the prosecuting authorities, subject to any confidentiality issues.

● In these circumstances, it will usually be necessary for the police or other prosecuting authority to interview the secret camera operator and members of the programme team about the methods they used. In addition to the diary he/she is required to keep, the secret camera operator should be made aware that their notes and other records may be considered relevant and that they will be a pivotal witness in any subsequent prosecution.

● In the event of legal proceedings or regulatory issues arising after transmission all rushes and other material will be central to our defence and so may be disclosed to the Claimant, in the case of legal proceedings, or to the complainant in the case of a regulatory issue, and to Ofcom, the regulator, itself.

Secret filming can be unpredictable with situations arising that need urgent attention. It is essential you maintain regular contact with your Commissioning Editor and feel free to call however trivial the question may seem at the time. **If you are in any doubt about anything in this document or require advice please contact your Commissioning Editor or Channel 4 lawyer, as appropriate.**

Please also see the Current Affairs Rules and Procedures for Best Practice and Compliance – available from the Legal & Compliance Department on 020 7306 8496 or Current Affairs on 020 7306 5359.

If you need urgent legal advice out of office hours a member of the Legal & Compliance Department is always available on a mobile – contact the Viewer Enquiries Department on the Channel 4 main number for the duty lawyer details or

call the Legal & Compliance Department on 020 7306 8496 to have your details added to the duty lawyer memo.

**Legal & Compliance Department
November 2005**

STAGE I PROFORMA

(To be typed on production company notepaper)

To: [Commissioning Editor]
Channel 4 Television
124 Horseferry Road
London
SW1P 2TX

Cc: Controller of Legal & Compliance, Legal and Compliance Department, Channel 4
[Programme Lawyer, if not Controller], Legal and Compliance Department, Channel 4

[Programme Title]

**APPLICATION FOR STAGE I
SECRET FILMING AND/OR RECORDING PERMISSION
UNDER SECTION 8.13 OF COM BROADCASTING CODE**

Date of application: [Insert date]

Number of application: [Insert sequential number for your project]

Subject(s): [Insert name of individual(s) or organisation(s) to be secretly filmed or recorded including their address, if known]

Background: [Details of the investigation (e.g.) An investigation to examine how staff at a funeral parlour are disrespectful to bodies placed in their care]

Evidence for concern: [Details of past abuses or cause of concern (e.g.) evidence from former employees; concerns raised by relatives; published reports of industry regulator in which the company is criticised]

Your plans: [include any cover story (e.g.) to send a member of the production team undercover to work as a trainee funeral director. This includes his first interview, formal company training in the handling of bodies and on the job training and practice]

Why covert filming/recording is necessary to the credibility and authenticity of the programme: [Explain why evidence could not be gathered by conventional methods]

Why story is of itself of important public interest: [Set out reasons]

Proposed date(s) of filming/recording: [Insert date(s)]

Proposed likely venue(s) for secret filming/recording: [Insert venue(s)]

Signed _____

Print your name _____

Title (e.g. Producer) _____

Date _____

**STAGE II PROFORMA
CHANNEL 4 MEMO**

To: Dorothy Byrne, Head of News & Current Affairs

From: Commissioning Editor

Cc: Jan Tomalin, Controller of Legal & Compliance

[Programme Lawyer, if not Jan], Legal and Compliance Department, Channel 4

[Programme Title]

**APPLICATION FOR STAGE II
SECRET FILMING AND/OR RECORDING PERMISSION
UNDER SECTION 8.13 AND 8.14 OF THE OFCOM
BROADCASTING CODE**

Background: [Brief description of the investigation/purpose of the film and the issues for concern or being addressed. Indicate who the film maker(s) are and name the Producer/Executive Producer and their experience]

Material to be broadcast: [State who carried out the secret filming, the dates during which filming took place, and what the footage reveals (e.g. *Unhygienic food handling practices, including not washing hands after using the toilet and sneezing over food preparation surfaces*)].

The section 8.13 test: [You will need to show that the secret filming was warranted, which must include: 1) Why the filming was done in the public interest – i.e. what is the public interest element? 2) Why the filming was necessary to the **credibility and authenticity** of the programme; 3) Whether **further material evidence** (additional to that obtained prior to the Stage I application) was obtained.]

Right of reply: [If applicable, you should indicate whether any parties filmed for the programme were given an opportunity for a right of reply, and if so, how any such replies will be dealt with in the programme. If any injunction proceedings have been issued as a result of giving a right of reply, then include the status of those proceedings.]

Privacy issues: [If there are any issues regarding privacy, such as concealing identities of subjects, then please indicate briefly why and how this will be achieved.]

Signed _____

Print your name _____

Title _____

Date _____

**7D.
CHECK LIST
FOR SECURITY
PROTOCOL
FOR FILMING
IN POTENTIALLY
HOSTILE
COUNTRIES
JANUARY 2006**

CHECK LIST FOR SECURITY PROTOCOL FOR FILMING IN POTENTIALLY HOSTILE COUNTRIES

The following points are not exhaustive and some may not be applicable to your project. However, please consider all the points carefully when drawing up your protocol and liaise with your Commissioning Editor and the Lawyer advising on your project from the Legal and Compliance Department in addressing all the necessary issues. If there are any points relevant to your project which you feel are not on this list then please bring them to our attention. You must tell us if you feel you do not have adequate time to research properly in order to assess and respond to any potential risks.

1. PERSONNEL

Who will be travelling to the country in question and engaged in the filming? Please include names and details of the entire crew, including camera and sound operatives.

- What experience does each member of the team have filming in hostile regimes generally and of this regime or ones like it in particular? The team should be appropriately experienced.
- Has every member of the team attended a hostile environment training course? If not, are they nonetheless adequately experienced?
- Who will be the fixer or fixers on the ground? Are they adequately experienced for their likely role? Do you have translators who are competent and can be trusted? Might fixers or translators be at risk either during the filming or once the programme is transmitted?
- What are the personal circumstances of each member of the crew? Do they have

spouses, partners, children? Have they made their immediate family aware of any potential risks involved in this trip? Please provide contact numbers on the protocol for the next of kin.

2. PASSPORTS AND VISAS

- If production team members have more than one passport which one is it most sensible for them to travel on? We suggest you leave a copy of all passports with the production company in case of loss.
- Are there any stamps in the passport showing that any team member has visited countries which might give rise to suspicions by the authorities in the country they are now visiting? Does your passport say you are a journalist, if you are not filming as a journalist?

● If the team are posing as non-journalists then please discuss with Channel 4 at the earliest opportunity your application for a visa. If you are filming openly as programme makers but you are not revealing the true or full nature of your programme then, again, please discuss with Channel 4 how to frame your visa application. Any deception must be justifiable.

● Would the published work of any team member, especially work with by-line/credits attached, give rise to suspicion and so compromise the team?

● We advise that the personnel travelling provide the production team with up to date photographs to leave in the office in the UK for clear identification purposes should this become necessary.

3. COVER STORY

● If you are purporting to be non-journalists then you will need to think carefully about your cover story. Are you

ordinary tourists? Are you, for example, bird watchers, interested in local flora or fauna, interested in local art? Whatever story you choose you will need to be adequately versed in the area in which you are purporting to have an interest.

- Clearly, a cover story which enables you to film the sorts of things and in the kinds of areas necessary for the programme is the most sensible option.
- Would your cover story implicate a local fixer, making them an unwitting accomplice to a “subversive” film?
- Any cover story should be discussed with the Commissioning Editor and, if necessary, the lawyer assigned to the project.

4. EQUIPMENT

- What sort of cameras will you be taking with you? Will they look like the kind of cameras which a tourist would have, if indeed that is your cover story? Is there the possibility of filming covertly? This would include filming with hidden camera equipment or any filming of which the subject is unaware. If you are taking covert filming and/or recording equipment what do you think would be the consequences if you were caught filming or recording in this way? If you envisage you might need to film covertly then please let us know in advance and as early as possible so that formal permission can be sought and obtained from the relevant senior editorial person at Channel 4.
- Make sure you know how your camera equipment could help you, e.g. many small digital cameras also operate as stills cameras and one flick of a switch could turn potentially damaging moving footage into a series of innocent tourist stills.
- Might you need any other specialist equipment, e.g. body armour, for personal

safety? Take appropriate advice.

5. PREVIOUS EXPERIENCE OF OTHER JOURNALISTS

● Please research what has happened to other journalists in this regime if they have been caught filming by the authorities. Please look into whether this filming was open, covert or involved matters or places that the authorities did not want to be filmed. We may be able to put you in touch with journalists who have had experience of such areas.

● Is there a significant risk of kidnap to journalists, have they been specifically targeted in the country in which you are filming?

6. CONTACT WITH THE UK

● Please ensure that you have an adequate system for regular contact with your team in the UK so that we can all feel confident that you are safe and devise in advance a back-up plan if you do not make contact as planned.

● Please make sure all relevant numbers are known to all members of the team, in the UK and abroad, and that Channel 4 is also informed.

● It is helpful to arrange in advance who, in the production team, and how often you will be contacting them.

● If you are going somewhere where there is a real risk of kidnap, it may be helpful to agree a special form of words which can indicate that you are in a compromised position and therefore unable to speak freely (e.g. “how is your Aunt Edith?”). That way the contact in the UK can start emergency procedures.

- Please include the Foreign Office and relevant consulate numbers on the protocol so that they can be accessed easily if necessary.

7. FILMING AND INTERVIEW PLANS

- Please consider in advance and advise us on the areas in which you are likely to be filming, the subject you are likely to be covering and the individuals you envisage interviewing.
- You will need to consider as best you are able the likely risks involved in your plans. Do any local laws or customs affect the risk of your plans, e.g. if women can only travel wearing a burkha.
- Please consider whether or not innocent people you film, overtly or covertly, might be at risk once the programme is broadcast. This will enable us to decide before transmission whether we need to take further advice on this issue or further steps to protect them, e.g. by concealing faces or changing names.

8. CONTACTS IN THE COUNTRY YOU ARE VISITING

- Is it possible to devise a plan of action if you are caught filming to contact a person or group for assistance? For example, aid agencies, local charities, human rights groups or local journalists who would be sympathetic to the aims of the film might be potentially useful contacts for assistance.
- What is your plan if you are caught by the authorities? Will you say that you are journalists? Should you endeavour to arrange legal representation in advance in the country you are visiting in case of difficulties while you are there? Is there a British Embassy or Consulate you could contact in an emergency?

9. RUSHES

- Is there a risk that your rushes might be seized by the authorities? Should you make arrangements to send rushes out in tranches?
- Should you make arrangements to copy material while you are there? Please consider these issues and make the necessary arrangements.

10. OTHER PRECAUTIONS

- Please ensure that the whole team has had the necessary vaccinations and medical advice for their travel.
- Please liaise with Hayley Thornton in Programme Finance and Media Insurance Brokers to ensure that production insurance issues are adequately addressed for each individual well in advance of your trip.
- Please think carefully about the material you take with you and accumulate while you are in the country in question and think about the consequences if you were discovered with it by the authorities or those hostile to the project, e.g. names and numbers in your mobile phone could give away the fact that you are a journalist or written outlines of your filming intentions could put your team at risk if they fell into the wrong hands.
- How much money should you carry with you? Will it be necessary to make modest payments to minor officials or would that be risky? Consider this in advance with your fixer.

Going to a hostile environment involves potential risks and personal safety is paramount. We do not want you to take unnecessary risks or do anything which might endanger safety. Please do not hesitate to contact your Commissioning Editor, the Lawyer advising on your project

or the Duty Lawyer at anytime to discuss any concerns you might have or areas you feel must be addressed before, after and during your trip.

Good Luck!

Channel 4 Television Corporation
January 2006

7E. GUIDE TO THE LAW OF FAIR DEALING – CHANNEL 4 & FIVE

This note is intended as a guide only and legal advice from Channel 4's or Five's legal and compliance department must be sought at an early stage.

WHAT IS FAIR DEALING?

- **'Fair Dealing'** is a term, which describes the circumstances in which copyright works or extracts from them, can be used, **without permission from or payment to the copyright owner.**

- If a copyright work is legitimately used under the 'fair dealing' provisions it is not necessary to clear any underlying rights in the work, e.g. if 'fair dealing' a clip from the film *Titanic* it would not be necessary to clear the soundtrack contained in the clip of the film used.

- Outside of the news, the most common type of 'fair dealing' when making television programmes involves the use of 'clips' e.g. of television programmes, films, advertisements and music videos. Although 'clips' are referred to throughout this note all copyright works e.g. literary, dramatic, musical and photographic, are covered. However photographs cannot be used for the purposes of reporting a current event.

- **'Fair Dealing' cannot and must not be used as a means of saving money on your budget for clips.** The defence will automatically fail and you will be liable for copyright infringement if it is established that you have used 'fair dealing' simply to save money.

- 'Fair Dealing' is only a defence to copyright infringement in the UK. It will not be suitable for programmes that are to be sold or broadcast overseas, for example if your programme is a co-production with a foreign broadcaster or is to be made available via the web. Specific advice in the jurisdiction(s) to which sale is planned is

required where a programme containing fair dealing is to be broadcast outside the UK.

- Any material that has been 'fair dealt' in the programme cannot be included in any programme trails or publicity material, except in exceptional circumstances.

HOW DOES IT WORK?

- **Section 30 of the Copyright, Designs and Patents Act 1988** (as amended by the Copyright and Related Rights Regulations 2003) sets out the conditions that must be met to legitimately 'fair deal' a copyright work.

- There are two forms of fair dealing set out under section 30: -

- for the purpose of reporting current events; and,
- for the purpose of criticism or review.

A: Fair dealing for the purpose of reporting current events

- **Photographs are excluded** under this limb but can be 'fair dealt' for the purposes of criticism or review (see below).

- **Sports material is excluded.** The latter is regulated under an agreement between the main broadcasters called *The Sports Access Code*, which allows certain clips to be used in regularly scheduled news programmes only.

- There are two ways of using copyright material under this limb:

- to report the actual current event in question; or
- to give "old" pictures that required "currency".

- The most common use of fair dealing under this limb is to report the actual

current event. For example a news report on the Oscars Ceremony might use a clip taken from a US broadcaster's coverage of the awards, to report the fact of the winner for Best Performance by an Actor in a Leading Role.

- What constitutes a current event will depend on the currency of the event and whether it is genuinely newsworthy.
- The clip being used needs to have some *direct* relevance to the current event being reported and not just a tenuous connection.
- For example the Oscars Ceremony may only have currency for up to 24 hours after the announcement of the winners. However a US broadcaster's footage of the devastation caused by a major natural disaster might last longer as part of ongoing news coverage into the plight of the hurricane victims.
- Clips can also be used under this limb to give 'currency' to 'old' pictures. For example a clip of the Oscars Ceremony announcing the Lifetime Achievement award, which included the actor talking about living just long enough to win the award or a clip of an old film he had appeared in, could be used some months later to report the same actor's untimely death.

● Take for example the wedding of Prince Charles to Camilla Parker-Bowles. That current event can be reported contemporaneously under 'fair dealing' by the use of any of the following clips:

- (a) Prince Charles and Camilla inspecting the Guildhall in the run up to the wedding;
- (b) Clarence House's official announcement of the engagement of the couple;
- (c) Guests arriving at Windsor Castle for the wedding reception;
- (d) Lord Falconer's comments on the

legality of the wedding.

However it would not be 'fair dealing' for the purpose of reporting the above current event to show clips of:

- (a) The wedding of Prince Charles to Lady Diana Spencer; or
- (b) Prince Charles' gaffe (regarding his dislike of a BBC reporter) in front of reporters whilst on his annual skiing trip with Princes William and Harry; or
- (c) Martin Bashir's interview with Princess Diana in which she said that there were 'three people in my marriage'.

B: Fair dealing for the purpose of criticism or review

● The use of 'fair dealing' under this limb should generally be restricted to situations where permission to use copyright material would be or has been refused or where unreasonable restrictions have been placed on its use. It is most commonly used where the subject of a programme is unlikely to like the way in which they are portrayed, for example a biography programme of an actor which is critical of them and with which they have not co-operated.

● It is an essential prerequisite to 'fair dealing' for the purpose of criticism or review that the copyright work has been previously published. For example, by means of an authorised performance, exhibition, playing or showing of the work in public. **If the copyright work is unpublished it cannot be fair dealt under the criticism or review limb.**

● The clip being used needs to be *directly relevant* to the critique or review being undertaken and not just have a tenuous connection.

● Clips cannot be used simply as

"wallpaper", e.g. as a sting, in a title sequence, start or end of part reprise, tease, fast-cut montage or as a backdrop.

- In deciding whether clips have been used *for the purpose of criticism or review*, the Court will consider the programme's likely impact on its audience and what a reasonable viewer would understand to be the purpose of including the material.
- Fair dealing *for the purpose of criticism or review* has to be the genuine purpose of the use. Dressing up the infringement of another's copyright in the guise of criticism or review is not 'fair dealing' and your defence will fail. There are two ways to use relevant clips: -

(a) in the context of reviewing/criticising the clip itself – e.g. use of clips of a music video to illustrate how well/badly the artist performed in it; or how it was directed.

(b) in the context of some other relevant criticism, such as of a theme or philosophy behind a work: e.g. use of clips from the film *A Clockwork Orange* in the context of criticising the treatment of violence in the film and whether it was a justifiable reason for the decision of director Stanley Kubrick not to release it in the UK ('the Clockwork Orange case')¹ or, e.g. to show an advertisement, or a clip from it, criticising the exploitation of children by a burger chain, by reference to the way the advertising deliberately appeals to children.

- The criticism or review may be in the form of an interviewee's sync, voice over, commentary or text on screen provided the critique or review is pertinent and not unduly lengthy (see below). The criticism or review can run before, after or concurrent with the clip being used.
- While you are free to edit the clips fairly to accompany the critique or review, you must not manipulate the clips e.g. by

adding in comic or special effects. The use of slow motion may be acceptable where it is essential to the point being made.

● Where you plan to rely on an interviewee talking about the clip, it is always helpful to ensure that you show them the actual clips beforehand to ensure that their comments are specific and relevant to the actual clips used.

WHAT IS A SUFFICIENT ACKNOWLEDGEMENT?

● An essential condition of using part of a copyright work whether for the purpose of reporting a current event or for the purpose of criticism or review, that there is a sufficient acknowledgement to the author and title of the work. The required acknowledgment is usually supered on the screen when the clip is shown but, in some cases, it may be sufficient to put the acknowledgement in a list in the end credits of the programme, for example where you are using a large number of clips.

● In exceptional circumstances no acknowledgement is required but only when fair dealing for the purpose of reporting a current event "*where it would be impossible for reasons of practicality or otherwise*".

● The acknowledgement needs to refer to the title of the work and its "author", which will often, but not always, be the copyright holder. The following are examples, which can be used for different types of copyright works.

● **Literary Works**

The author e.g. *'Harry Potter and the Goblet of Fire'*/J K Rowling

● **Dramatic Works**

The writer e.g. 'A Few Good Men'/Aaron Sorkin

● **Music**

Music composer and lyricist if applicable
e.g. 'Yesterday'/Lennon and McCartney

● Music Video

The artist, lyricist, composer, record company, and director e.g. 'Angels'/Robbie Williams/ R. Williams & G. Chambers/ EMI Music

● Art

The artist e.g. 'My Bed'/ Tracy Emin

● Photographs

The photographer e.g. 'Princess Diana'/ Mario Testino

● Film

The studio, producer and principal director e.g. 'A Clockwork Orange'/Warner Brothers Inc./Polaris Productions Inc./ Stanley Kubrick

● Broadcasts

The Broadcaster and Production Company e.g. 'Big Brother 6'/Channel 4/Endemol Productions

● Advertisement

The advertising agency and the production company e.g. 'Mr Kipling-Delivery'/ Saatchi & Saatchi/ David Lodge

● The Courts have held that where a clip features an on screen broadcaster's logo this was sufficient to identify the broadcaster as the author of the work, in spite of the fact that the broadcaster was not named in an on screen caption.

● The Courts have also held that oral statements that accompany the clip, e.g. an interviewee's sync, which acknowledges the author, would equally constitute a sufficient acknowledgement.

● The acknowledgement must be large enough to be legible and on screen long enough for viewers to be able to identify the title and author of the work.

HOW DO I GET HOLD OF THE COPYRIGHT WORK?

● The sourcing of the copyright work must be fair. You must not obtain it in any unlawful, devious or underhand way e.g. obtaining preview tapes from a copyright owner by pretending that you intend to licence clips.

● If you have already signed a licence or if you have already begun negotiating a licence or licence fee you may have created a contractual relationship where it would not be possible to 'fair deal'. In such circumstances you must seek immediate advice from The Legal and Compliance Department.

● In the *Clockwork Orange* case, a laser disc of the film was legitimately purchased in Paris and then brought to the UK and transferred to BETA. This was deemed by the Court to be a fair method of obtaining the material. Similarly, recording material off-air would be deemed to be acceptable.

● Whether or not material of broadcast quality is available legitimately, will clearly affect the prospect of being able to 'fair deal' it. If you cannot access the material fairly, you will not be able to use the 'fair dealing' provisions.

● A published copy of a work which infringes the owner's copyright will not be a legitimate source e.g. an unauthorised copy on a website.

HOW MUCH OF THE COPYRIGHT WORK AM I ALLOWED TO USE?

● You are only permitted to use a 'fair' amount of the copyright work.

● As a guide the clips should not be

unreasonably long or frequent in use. Each clip must be justified in terms of its duration and its relevancy to the critique, review or current event being reported.

● In the *Clockwork Orange* case the programme consisted of a total of 12' of clips from the movie in a 30' programme. The Court accepted that one could not do justice to a review of the film unless one showed a number of clips from it.

DO I NEED TO INFORM THE COPYRIGHT OWNER BEFORE TRANSMISSION?

● Sometimes, as a matter of policy, we *may* want to inform a rights holder that we are intending to use clips of their material under 'fair dealing' before transmission. However, this is only rarely the case and you should check with a member of the Legal & Compliance Department before contacting rights holders to inform them of your intention to 'fair deal' material.

● If you plan to 'fair deal' any Channel 4 or Five purchased programmes or films, you must ensure that your commissioning editor is made aware as soon as possible, as this may give rise to potentially sensitive commercial issues. This is not intended to restrict your right to legitimately 'fair deal' but to ensure that it does not compromise the broadcasters' relationships with suppliers.

¹ Time Warner took legal action against Channel 4 to prevent clips from the film *A Clockwork Orange*, which it owned, being used in a programme critique. Time Warner failed and the programme was broadcast. This was the first case to test the 'fair dealing' legislation (for the purposes of criticism and review) and laid down the guiding principles.

8 FIVE APPENDICES

8A. VIEWER TRUST GUIDELINES

1. INTRODUCTION

These guidelines set out the basic requirements concerning viewer trust to which producers must adhere when making programmes for Five. While programme making is a collaborative process between broadcaster and producer, Five has to rely on the producers' commissions to be honest and open at all times. This trust creates the obligations set out in these guidelines which reflect good practice.

These guidelines must be circulated to all production staff and it is the producer's responsibility to ensure that everyone working on a programme for Five understands and adheres to these principles. Five's programme commissioning editors and legal and compliance department are always available to offer advice and guidance and should be consulted as specified in these guidelines and whenever doubt exists as to how best to proceed.

A breach of viewer trust could lead not only to undermining Five's relationship with its viewers but also to investigation by Ofcom which has the power to impose significant sanctions against Five. It will also inevitably lead to adverse publicity for all concerned.

2. THE PRINCIPLES

Viewers must not be materially misled by what they watch. Deceiving or misleading viewers is unacceptable and undermines the relationship of trust between Five and the viewing public. Undermining the relationship of trust also adversely impacts on Five's status as a public service broadcaster and its business and will therefore not be tolerated.

This principle is also reflected in the Ofcom Broadcasting Code which states:

Factual programmes or items or portrayals of factual matters must not materially mislead the audience. Section 2.2.

Five is bound by the terms of the Broadcasting Code under its licence and a breach of the Code could lead to sanction, including a significant fine and a shortening or revocation of its licence.

The principles of viewer trust also apply in any situation where the viewer interacts with Five and in particular where there is any commercial relationship with the viewer. The issues surrounding this area are specifically dealt with in Section 7 below.

3. WHICH PROGRAMMES ARE SUBJECT TO THESE GUIDELINES?

All programmes on Five are subject to the principles of viewer trust – it is not limited to news, current affairs and documentaries. Programmes which are essentially entertainment and 'formatted' programmes should also not mislead the viewer if they include a factual aspect.

Viewers are entitled to take at face value what they see in programmes with a factual element regardless of the genre of the programme or the title of the department from which it was commissioned.

4. VIEWER TRUST IN PRACTICE

Television programmes by their nature are rarely the literal reproduction of what exactly took place in real time in any situation. It is a creative medium which has to use editing techniques in order to reflect a coherent story or narrative in a manner which is engaging to the viewer. **However, the reality or truth of a situation must not be undermined or**

distorted and it will never be acceptable to portray something as happening which did not take place.

The key elements concerning viewer trust include:

- It must be made clear to viewers if apparent actuality is anything other than what it appears to be.
- Producers must not stage, construct, reconstruct, re-enact or otherwise create apparent scenes of actuality and seek to pass them off as the real thing.
- Producers must not request or incite someone to recreate or stage an event or action which has a bearing on the narrative of a programme or its outcome or which is central to the programme and to present this as something observed as it actually happened.

5. THE RESPONSIBILITIES OF PROGRAMME MAKERS

GENERAL

- Openness and honesty at all times between Five and its producers is central to the programme making process. Five will not seek to penalise a producer where a problem (potential or actual) is raised at the earliest opportunity and where remedial action can be taken.
- The pressure to deliver a programme on time or within budget or the editorial interests of a programme is NEVER an excuse for inventing a story or undermining the truth. Believing the 'show must go on', that is, putting the editorial needs of the programme first, is NEVER a justification or reason for misleading the viewer.
- Putting anyone on a production under pressure to deliver where that could lead, even inadvertently, to misleading the viewer is unacceptable.

- Concealing a problem on a production is unacceptable. Most issues can be resolved during filming or editing but not after broadcast, following which Five is likely to have to bear the consequences of the producer's actions.

- If a producer is having difficulties delivering a production or the programme cannot develop in the way originally envisaged, this must be raised at the earliest stage with the appropriate commissioning editor. Five understands the legitimate difficulties of programme making.

THE PRODUCTION TEAM

It is the responsibility of the executive or series producer to undertake the following on every production for Five:

- Staff the production with an appropriate number of personnel with the appropriate experience for a particular project.
- Ensure that any personnel working on the production who possess little or no experience are at all times properly monitored and managed particularly where they are given responsibilities dealing with contributors or situations where material is gathered which could mislead the viewer.
- Ensure that the production team is properly supervised both during the actual production and also generally at a senior level within the production company.
- Put in place and implement appropriate procedures to ensure that when any issue of viewer trust or the truth, accuracy or veracity of a programme arises that this can be quickly and openly escalated to senior production staff and then immediately to the relevant Five commissioning editor.
- Put in place and implement procedures that allow any member of the production

team (even the most junior) to raise any concern they may have over an issue relating to viewer trust, truthfulness, accuracy or the veracity of a programme. It is unacceptable that anyone involved in a production feels that they cannot raise a concern about the way a programme is being made or presented.

- Any issue or decision concerning viewer trust, truth, accuracy or the veracity of a programme must be raised with, discussed and agreed with the Five commissioning editor.
- When any decision is taken relating to a viewer trust issue it should be communicated to and understood by the production team.

It is the producer's responsibility to inform the Five commissioning editor if there is any concern about the authenticity of any footage and how it was filmed. It will then be a matter of judgement as to whether such footage is included in the programme and if it requires signposting to the viewer. The responsibilities relating to viewer trust and authenticity apply equally to third party footage supplied or bought in for a programme. Applying common sense and good judgement will usually be a good test in any situation – but if reality has been materially distorted then the viewer is likely to have been misled and the line of what is acceptable crossed.

6. WHAT PRODUCTION TECHNIQUES ARE ACCEPTABLE AND UNACCEPTABLE?

Not every situation or eventuality can be addressed in these guidelines, however, the key principles are highlighted which can be applied to a particular case.

GENERAL

- Many established programme-making

techniques raise no concerns about viewer trust – cutaway shots, 'set up' shots to establish a contributor or 'pick up' shots all allow the programme maker to create a seamless narrative which aids and enhances the viewing experience and which do not materially mislead the viewer about the story they are watching.

- Significant actions or events or those that are material to the story or narrative must not be created or re-enacted for greater dramatic or other effect.
- Behaviour or actions must not be deliberately provoked or encouraged which would not have occurred naturally, unless the audience is made aware that this is part of the programme.

Any judgements as to what is and is not material should be made jointly by the producer and the Five commissioning editor.

SOME SPECIFIC CASES WHICH MAY RAISE ISSUES OF VIEWER TRUST

Factual accuracy – programmes must be factually accurate and any assertions or allegations should either be capable of being substantiated or be portrayed in a manner that viewers understand there maybe a dispute over such assertions.

Portrayal of primary sources – where the viewer could reasonably believe that what they are seeing is primary source material whether it is first hand footage, photographs or physical evidence then this must be the case. If the viewer could be misled by what they are seeing it should be labelled to say it is 'reconstructed'.

Treating contributors and editing interviews fairly – contributors must give their informed consent to take part in programmes, that is, they must understand the nature of the programme and in general

terms how they will appear. Interviews and other contributions must be edited fairly and not misrepresent what the contributor has said or their position.

Chronology and the suppression of time – on occasion material may have to be shown out of chronological sequence in order to be able to make sense of the narrative. This is not necessarily problematic as long as the viewer is not materially misled. Also, time scales may need to be condensed otherwise a programme could be overly long or slow. Again, unless this is done in a manner that creates a false impression of what actually took place this should not be problematic.

Creative programme making – some programmes will use unusual or innovative filming to assist telling a story. This can be seen in stylised factual programmes where techniques are used to create a certain atmosphere or to portray people in a particular manner. This is acceptable as long as it is apparent to the viewer when these techniques are being used and that scenes that are important to the narrative of the programme are not portrayed as being actuality when they are not. Legitimate contrivance must not be passed off as observed actuality.

Informing the viewer – Viewers will often understand the conventions of programme making and that some artifice is required. Where the viewer could be misled as to the nature of what they are seeing some signposts maybe appropriate. What signposting is required will depend on the nature and genre of the programme and the importance of a particular sequence. For example, a reconstruction from a period in history before the advent of television will not require a label that it is reconstructed but footage stylised to look contemporaneous and authentic may do. Secretly filmed material may require a specific label to distinguish it from open

filming where the viewer could be confused. An entertainment programme featuring a humorous set up may well not require any label as it is self evident what is taking place. Any signposting to be undertaken should be approved in advance by the Five commissioning editor.

SOME CASES WHERE THE PRODUCER COULD BE MISLED AND THEREFORE THE VIEWER

Hoaxes – producers should always be vigilant to ensure that they are not the subject of a hoax by a contributor. Never take anything at face value – ensure there is evidence to substantiate what the contributor says about themselves and what they have done. If a story is particularly good – always check it. Does the contributor have some vested interest in what is being said? Even if a producer and Five is the subject of a hoax we may still be criticised for not ensuring the authenticity of what we were told. If you doubt a contributor seek advice from the Five commissioning editor.

Filming criminals or criminal behaviour – this is an area of great difficulty and obtaining early legal advice is vital. Assertions by criminals need to be verified. Always ensure that you are not being misled or set up by a criminal for his own interests – it may be the case that they will not be truthful later or will have a vested interest in their own preservation.

7. COMMERCIAL ACTIVITY

INTERACTION WITH VIEWERS

Where a programme seeks participation and in particular where there is a commercial transaction, for example, the use of premium rate telephony, SMS or red button the viewer must be treated fairly at all times regardless of

the editorial or other needs of the programme.

Fulfilling fairly the service for which the viewer has paid is the primary obligation. Protecting the viewer from financial harm overrides the editorial or other interests of the programme.

The conduct of any competition or mechanic which involves viewer interaction whether paid for or not must be fair in all respects. This principle is also reflected in the Ofcom Broadcasting Code.

No commercial activity is permitted within Five's programmes without the prior consent and involvement of the channel. Often legal and commercial advice will be required.

COMMERCIAL INVOLVEMENT WITH PROGRAMME MAKING

Producers must not accept any commercial or other benefit from a third party in relation to the making of a programme without disclosing it to Five before it is provided. Any such benefit maybe a breach of the Ofcom Broadcasting Code (e.g. product placement) or result in the programme being treated as sponsored which requires specialist guidance or could undermine or appear to have undermined the editorial independence and objectivity of the programme maker and Five.

8. COMPLIANCE AND THE RELATIONSHIP WITH FIVE

Programme making is a collaborative activity and producers must always keep Five's commissioning editor apprised of all significant developments and anything which could impact on viewer trust. Five for its part will respond to any advice or guidance sought by producers. Compliance is a shared responsibility between the editorial teams at Five and

the production company with appropriate advice and guidance from the legal and compliance team. The legal and compliance team will work with commissioning editors and production staff to get programmes to air within the parameters of the law and regulation. However, this requires programme makers to seek advice at the earliest possible stage. If you have any doubt about who to speak to contact the appropriate commissioning editor.

Producers are expected to have read and comply with the provisions of the Ofcom Broadcasting Code.

Producers will be expected to have read and comply with the provisions of and guidance of this Handbook.

If you have any concerns about these guidelines or your obligations and responsibilities seek advice from the commissioning editor responsible for your programme or the legal and compliance department.

Failure to meet the standards set out in these guidelines will be viewed with the utmost seriousness by Five and could be treated as a breach of the producer's warranties under the production agreement.

Evidence of a breach of these guidelines in any Five programme will be investigated by senior executives at Five. Where appropriate, proportionate action in respect of any breach will be taken on a case by case basis. Where there is evidence of repeated breaches of these guidelines and the principles of viewer trust by a particular independent producer Five may impose stricter controls on or review its relationship with that producer.

October 2007
Five

8B. LIVE PROGRAMMING PROCEDURES

1. PRE-BROADCAST PROCEDURES

- Commissioning editors should take early advice from the programme lawyer prior to broadcast of a live programme or series so that appropriate arrangements can be made.
- Commissioning editors must ensure that presenters are properly equipped to handle the demands of a particular live programme and that the production company and those working on the programme have the appropriate expertise in this field.
- The commissioning editor and programme lawyer primarily responsible for the programme must ensure that wherever necessary the production team are properly briefed on the legal and regulatory issues concerning the programme. Consideration should be given to a seminar before the programme/series goes to air. In any series which is long running or is a returning series where production staff change a seminar is mandatory at the start of each series or substantive run and thereafter at least once annually.
- Guidance notes relating to the particular programme or series are advisable. These should cover:
 - The provision of advance information to Five concerning the programme's content, guests, discussion topics etc;
 - Advice to be given to guests particularly if they are members of the public who are unused to appearing on television. This will depend on the nature of the programme and the time of broadcast;
 - How to deal with problems that arise during broadcast and the steps to be taken.

- There is a legal defence to libel in live programmes where the broadcaster has no effective control over the maker of the statement, provided the broadcaster and producer took all reasonable care and did not know and had no reason to believe anything they did caused or contributed to the broadcast of the defamatory statement.

2. DURING BROADCAST

- The commissioning editor should usually either watch all live broadcasts or make arrangements for a member of the programming department to watch them. Arrangements should be made to ensure there is direct telephone contact with the producer. Any decision not to view a live programme as it is broadcast must be discussed and agreed with the programme lawyer before transmission. It will not normally be necessary to watch live sports or quiz programming.
- Whether it is necessary, in addition to the commissioning editor, for a programme lawyer to watch the programme go out live will be decided on a case by case basis, depending on the nature of the programme and the content.

- Appropriate communication with the presenter must be arranged before a live broadcast. If they are not on 'talk back', some form of communication with the presenter must be set up.

3. APOLOGIES PROCEDURE

- Each case must be considered on its particular circumstances and wherever practical advice sought from a programme lawyer.
- **Defamatory statements** – these may need an immediate response. It may be necessary to dissociate the presenter,

programme, and channel from the comment through a brief clarification or statement. The wording of this should normally be prepared by the programme lawyer. Unless directed, presenters should not repeat or refer back to a defamatory statement.

- **Very strong language pre-watershed or a remark or language which is likely to cause widespread or significant offence at any time** – wherever possible the presenter should apologise immediately and/or distance the programme from the language or remark.

- If the presenter fails or is unable to apologise, consideration must be given to an apology at the end of the programme by presentation. This needs to be agreed by the commissioning editor and programme lawyer.

4. AFTER BROADCAST

- In the event of any significant incident during a live programme which gives rise to a legal or regulatory issue, the programme lawyer must be notified by the commissioning editor. If a live programme is to be repeated on Five or another Five channel or on a '+1' service, arrangements must be made to either edit any inappropriate material or provide a warning or viewer information announcement, if it is something that may cause offence.

- If a comment is libellous, it must be edited before any repeat of the programme.

August 2007

8C. RULES OF PRACTICE AND PROCEDURE FOR SECRET FILMING AND RECORDING FOR PROGRAMMES COMMISSIONED BY FIVE

1. INTRODUCTION

Secret filming and recording are powerful journalistic tools. Material obtained covertly may be the only evidence of the wrongdoing it captures. Given the power of secret filming it must be undertaken responsibly.

The act of secretly filming has an impact on an individual's right of privacy which can only be overridden where there is a genuine public interest which outweighs that right.

Five has drawn up these guidelines to ensure that the secret filming and recording carried out on our programmes accords with the Ofcom Broadcasting Code (see Sections 8.13 and 8.14 of the Code) and in order to maintain the highest possible journalistic standards. The conduct of producers could be judged by the regulators and the courts and compliance with these guidelines is paramount; failure to do so could lead to sanction and potentially legal liability.

After transmission, footage obtained covertly could become evidence in a criminal prosecution or a libel trial. The way in which the footage is obtained must not, therefore, be open to criticism as to its authenticity or for the methods used to obtain it.

This document refers throughout to secret filming but the rules apply equally to secret audio recording. Secret filming covers not just the use of covert camera equipment but also situations where the subject does not realise they are being filmed although filming is being undertaken openly or when they may believe the camera is switched off. The Code defines "surreptitious filming or recording" (which is subject to these rules) as:

"Surreptitious filming or recording includes the use of long lenses or recording devices,

as well as leaving an unattended camera or recording device on private property without the full and informed consent of the occupiers or their agent. It may also include recording telephone conversations without the knowledge of the other party, or deliberately continuing a recording when the other party thinks that it has come to an end."

Covert filming and recording should never be considered just another programme technique and must not be abused.

This document must be copied to all members of your production team and it is the responsibility of the executive producer and the producer to ensure that it is carefully read, understood and adhered to by all those working on a particular programme.

2. PROCEDURE BEFORE UNDERTAKING SECRET FILMING

Secret filming must not be used as a 'fishing expedition' in the hope that incriminating material may be captured. Some evidence of wrong doing must be obtained BEFORE recording is undertaken which justifies secret filming. What constitutes sufficient evidence of wrong doing will vary according to the facts and circumstances of each case.

All secret filming must be approved by Five **in advance**. This requirement will only be waived in exceptional cases where prior approval is not possible due to the particular circumstances of filming. Please notify Five in good time of any plans to film secretly, preferably at least two full working days in advance, so that the approval process can be properly instituted. The notification should be sent to the Five programme lawyer and the commissioning editor. You must undertake the following when considering any secret filming:-

● Consider how your proposals will meet the requirements of Section 8.13 of the Ofcom Broadcasting Code which states that the material acquired through secret filming must be "*necessary to the credibility and authenticity of the programme*" and the story under consideration is in "*public interest*".

● Discuss your plans with the commissioning editor and the Five programme lawyer responsible for your programme.

● Make a detailed written request to the commissioning editor and the lawyer, setting out your proposals including:-

● Who will be operating the equipment and who will accompany them?

● What equipment will be used and where will the secret camera(s) be placed, e.g. in a jacket or in a bag?

● The subject(s) of the secret filming.

● The proposed circumstances of the secret filming – location, timing, whether it will take place on a specific date or when circumstances allow.

● The reason you think it complies with the test under Section 8.13 of the Broadcasting Code – what evidence is there of wrong doing, why can't the footage be obtained conventionally and why is there a public interest to the story?

● What is the proposed cover story of the secret camera person and their companion(s)?

● Where appropriate, what arrangements have been made for their safety and is there a clear plan to exit a situation?

An outline pro forma application which you should follow is attached.

You must notify Five in writing, beforehand if possible, of each new secretly filmed encounter even if it is already covered by an existing secret filming approval. Each new request should be numbered sequentially.

3. PROCEDURE FOR OBTAINING APPROVAL AT FIVE

Once Five has details of your proposals your commissioning editor will discuss these with the Five programme lawyer and with the Director of Programmes or the most senior programming executive who is available. You will be advised when approval has been granted or whether more information or evidence is required.

4. THE RESPONSIBILITIES OF THE PRODUCER ONCE SECRET FILMING HAS BEEN APPROVED BY FIVE

● There must be set up an adequate logging system for secretly filmed rushes which shows:-

● The date and time of filming.

● The place.

● Who was filmed and who was present with the secret camera person.

● When the rushes were received at the production company.

● When they were viewed by the producer and any other production personnel.

Five may wish to see rushes and/or accurate transcripts at any time during production, before transmission and after transmission, in the event of any legal or regulatory issue arising. Original secretly filmed rushes and the logging system must be preserved for

at least four years from the date of the programme's transmission.

- Producers are directly responsible for logging and viewing all the secretly filmed rushes as soon as reasonably practicable, preferably no later than 24 hours after they are delivered to the production company.
- The Executive Producer or the most senior member of the production is responsible for ensuring that he/she has viewed all necessary secretly filmed rushes, depending on the nature of the project and production personnel.
- The producer (and executive producer where applicable) are responsible for telling the commissioning editor and/or the Five programme lawyer promptly of any matter of concern of which he/she becomes aware. This includes:-
 - Any inappropriate behaviour by the secret cameraperson and/or their companions, for example, any attempt to provoke or improperly entrap the subject(s).
 - Anything which suggests that the footage is not authentic.
 - Any matters which could have a bearing on the direction of the story and the content of the film.
 - No further secret filming should take place until the rushes of the previous secret filming have been checked by the producer, unless there is a compelling reason why this cannot be done.

5. RULES OF CONDUCT FOR SECRET CAMERA OPERATORS

The producer (and executive producer, where applicable) are individually and directly responsible for the conduct of the secret camera person and anyone

accompanying him/her undercover and for making them aware before filming commences that they:-

- Must remember that whatever they say once the camera is running may one day be heard by the subject being covertly filmed. They must, therefore, be sensible about what they say and how they behave before and after the filming of the subject.
- Are required to keep a detailed diary of their secret filming and all other meetings/conversations with the subject(s). This will form a contemporaneous record of their dealings with the subject(s) and/or a valuable evidential record if the camera fails.
- Must agree their cover story with the producer beforehand. The level of any deception must be commensurate with the story.

A secret cameraperson and anyone who accompanies them undercover will usually be playing a role which goes well beyond simple observation. In the process of interacting with the secretly filmed subject(s) care must be taken to ensure that wherever possible the secret camera operator avoids encouraging conduct which might not have occurred at all but for their intervention. A careful line must be trodden to avoid a subsequent accusation of improper entrapment.

- If any payment is made by the secret cameraperson or their companions to someone secretly filmed this payment should be referred to Five, and, if possible, approved in advance. Such a payment may affect the credibility of that person and we may decide it is necessary to inform viewers about it.

If a subject becomes aware they have been secretly filmed Five must be notified as soon as reasonably practicable.

On no account must a secret cameraperson or anyone undercover construct, reconstruct or otherwise fabricate scenes and pass them off as if they really happened.

No filming which could have taken place openly should be passed off as secret.

Any scenes which reconstruct or re-enact real events, even with the real people involved, must be clearly labelled in the programme to avoid confusion on the part of the viewer.

6. SUPERVISION OF SECRET FILMING BY THE PRODUCER

The producer must ensure that:-

- All members of the production team have received a copy of this document and have read and understood its terms.
- The person secretly filming is able to take on the tasks and responsibilities required of them. He/she must be familiar with the operation of the equipment and the risks involved. The safety of those undercover is paramount.
- He/she adequately supervises the secret cameraperson throughout their research as well as throughout the undercover operation.

If the secret cameraperson is not an experienced television journalist, Five requires, **before secret filming commences** to see:-

- A police check on whether he or she has any previous convictions, if considered appropriate.
- A detailed CV.
- References, as appropriate.

- A written report on any existing relationship between the secret cameraperson and the proposed subjects of the secret filming.

These must be sent to the commissioning editor and the Five programme lawyer.

If it is thought appropriate, even if the secret cameraperson is an experienced television journalist, Five may well require him or her to undergo a police check on their previous convictions if the undercover operation is likely to involve him/her in the technical commission of a criminal offence, for example buying drugs or handling stolen goods.

In the event that the journalistic activity involves the technical commission of a criminal offence, albeit without criminal intent, early advice should be obtained from the Five Legal and Compliance Department on the specific procedures which should be followed as a strong public interest case will have to be made out. The physical evidence obtained may well form the basis of a subsequent prosecution of the individuals whose criminality has been exposed.

7. UNDERCOVER IN AN ORGANISATION OR COMPANY

If the secret camera operator or other person going undercover is to be obtaining a position as a employee or similar position in a company or organisation, specific advice must be sought from the Legal and Compliance Department beforehand. In particular, the following rules must be followed:-

- Any remuneration received from the company/organisation must be paid into an account set up for that purpose.
- The secret cameraperson must not purport to have qualifications or

experience which he/she does not have where this might put them or others at risk or lead to legal problems.

- Five's Legal and Compliance Department must be consulted before application forms for such positions are filled in.

8. PROCEDURE FOR OBTAINING PERMISSION TO BROADCAST THE SECRETLY FILMED MATERIAL BEFORE TRANSMISSION

Your commissioning editor is required to seek prior approval in writing from the Director of Programmes to broadcast material obtained by secret filming. The material which we propose to broadcast must also satisfy the requirements of Section 8.13 of the Broadcasting Code, that is, it must be necessary to the credibility and authenticity of the programme and that the story being followed is in the public interest.

9. AFTER TRANSMISSION

- If the secret filming has revealed the commission of a criminal offence, Five may consider, in consultation with the producer, disclosing the secretly filmed footage and other material to the prosecuting authorities unless they contain a confidential source or other confidential material.

- In these circumstances, it will usually be necessary for the police or other prosecuting authority to interview the secret camera operator about the methods they used. In addition to the diary he/she is required to keep, the secret camera operator should be made aware that their notes and other records may be considered relevant and that they will be a pivotal witness in any subsequent prosecution.

- In the event of legal proceedings or regulatory issues arising after transmission all rushes and other material will be central to our defence and so may be disclosed to the Claimant, in the case of legal proceedings, or to the complainant, in the case of a regulatory issue, and the regulator itself.

If you are in any doubt about anything in this document or require advice please contact the appropriate Five programme lawyer.

If you need urgent legal advice out of office hours a member of the Legal and Compliance Department is always available on mobile.

Five
August 2007

To be typed on production company notepaper

To: [Commissioning Editor]
Five
22 Long Acre
London
WC2E 9LY

and: [Programme Lawyer], Legal and Compliance Department, Five

[Programme Title]

APPLICATION FOR PERMISSION TO SECRETLY FILM AND/OR RECORD UNDER SECTION 8.13 OF THE OFCOM BROADCASTING CODE

Date of application: [Insert date]

Number of application: [Insert sequential number for your project]

Subject(s): [Insert name of individual(s) or organisation(s) to be secretly filmed or recorded including their address, if known]

Background: [Details of the investigation]

Evidence which gives rise to concern and which justifies secret filming:

Your plans: [include details of how the filming will be conducted and any cover story]

Why covert filming/recording is essential to establish the credibility and authority of the story: [Explain why evidence could not be gathered by conventional methods]

Why story is of itself of important public interest: [Set out reasons including details of any alleged breaches of the law]

Proposed date(s) of filming/recording: [Insert date(s) or period over which approval for filming is required]

Proposed likely venue(s) for secret filming/recording:

Signed _____

Print your name _____

Title (e.g. Producer) _____

Date _____

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