

## GD MEDIA LAW BULLETIN 8

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GD Media Law Bulletin is a news review compiled quarterly by Goodman Derrick's Media Group. The aim of the Bulletin is to provide a brief summary of interesting developments in media law and regulation. The Bulletin is directed at journalists, producers and compliance officers. Detailed guidance on how those developments may impact upon programme makers and broadcasters is available from any member of the Media Group.

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### Introduction

This edition of the Bulletin sees an emphasis on the revised ITC Programme Code which came into effect this month. We also highlight recent legal decisions of interest and the more significant lessons to be learned from recent regulatory decisions.

### REGULATORY

#### The ITC Programme Code: April 2001

Whilst the new Code provides for no radical changes in policy, there are significant changes in emphasis. The following are the main changes to note but there is no substitute for reading the full code itself.

#### Family Viewing Policy (Section 1)

The Code's provisions regarding child viewers are now essentially gathered under the above section. There is an increased emphasis on the protection of children and on scheduling with regard to the 9pm watershed. Much more so than the old Code, this section stresses the need for providing information and guidance to audiences in order to avoid offending the audience's expectation. In particular, broadcasters must take account of school holidays (and the fact that they may vary across the UK).

Paragraphs on violence and imitative behaviour are also brought under this section. The new Code prescribes that broadcasters should avoid showing violence in a domestic setting as this will particularly upset child viewers. Care should also be taken with the portrayal of any household goods such as microwaves and tumble dryers readily accessible to children. A new paragraph "Warnings in Relation to Programmes Likely to Harm Children" refers licensees to the European Council's Television Without Frontiers Directive 1997. This requires that broadcasters take "appropriate measures to ensure that television broadcasts...do not include any programmes which might seriously impair the physical, mental or moral development of minors".

The old section entitled "Images of Very Brief Duration" now also comes under Section One. The section on sub-conscious influencing is shortened but the section on "Use of Flashing Images and Regular Patterns" is significantly lengthened as apparently this is a particular risk to young people.

The previous Code had an Appendix containing information and proposals on Pay-Per-View (PPV). This has now been updated, shortened and incorporated into the main body of the Code. It now appears in Section 1 in relation to viewer age and scheduling. What were merely ranked as suggestions in the old Code are now mandatory provisions of the new one, i.e. PPV operators are

now expected to implement a suitable film classification system, or equivalent, and to provide any additional information about programme content and reasons for any restrictions that might assist parents and other adults to judge the suitability of material for children.

## **Privacy & Fairness (Section 2)**

Traces of the Human Rights Act 1998 (HRA) can be found throughout the Code and nowhere more so than Section 2. The whole of Articles 8 and 10 of the European Convention on Human Rights are printed at the beginning of Section 2.

There is a new paragraph in this section entitled "The Public Interest". Where the Code makes provision for a significant intrusion into an individual's private affairs, the requirement of an important public interest to warrant this now predominates.

There is also a new paragraph entitled "The Public Domain". The ITC will have regard to the extent to which material has or is about to become available to the public when considering whether something is private or not.

The effects of the HRA appear in the paragraphs on secret filming and recording. The rules here now also apply to recorded telephone interviews. The previous Code provided that in such an interview the interviewer should identify himself as speaking on behalf of the broadcaster and obtain the consent of the interviewee. The old Code also said that if this was not a practical course to take, the explicit consent of the licensee's most senior programme executive must be obtained before the telephone interview was recorded. In the new Code consent of the licensee's most senior programme executive must be obtained both before the interview and again before any material is transmitted.

Further provisions regarding children appear in this section. A new paragraph reflects the requirements of the Youth Justice and Criminal Evidence Act 1999 (even though the Act is not yet in force) when dealing with pre-trial investigations into an alleged criminal offence relating to a person under the age of 18. The Code now contains a major and very broad prohibition on reporting "matters relating to a person under 18" who is involved in the offence as either the alleged perpetrator, the victim or as a witness.

## **Impartiality (Section 3)**

A new paragraph entitled "Opportunity to take part" appears in this section. This sets in stone the existing sensible practices which are needed if a broadcaster wanted to rely on a Reynolds defence in defamation proceedings (as covered in our Autumn 1999 Media Law Bulletin ). In summary, the new Code states that if a programme is alleging any wrongdoing, the alleged wrongdoer should normally be offered an opportunity to take part or comment. If a statement is provided, its original content must be represented fairly, even if it is edited. So far, so good since this reflects current best practice. However the Code goes a little further by stating that if the wrongdoer is unwilling to take part, care must be taken to "give as fair account as possible of his/her position". This could prove difficult if no statement at all has been given.

## **Party Political & Parliamentary Broadcasting (Section 4)**

Section 4 has been substantially restructured and is obviously of imminent importance.

There are new rules regarding coverage of constituencies at parliamentary and local government elections. If a candidate takes part in an item about a particular constituency then candidates of

each of the major parties should be offered the opportunity to take part. Under the old regime all the other candidates had to consent to the single candidate taking part and therefore the effective power of veto has gone.

Potential candidates in Parliamentary and local government elections are no longer prevented from taking part in programmes between the calling of the election and the close of nominations. However any constituency report or discussion broadcast after the close of nominations must include a list of all candidates standing and their party allegiance.

### **Commercial References (Section 8)**

This section 8 is significantly updated to reflect developments in technology. CD-Roms and DVDs are now included in the list of items that may be promoted only at the end of a programme.

The Code still prohibits the promotion of a product or service within a programme. Such promotion now includes advertising carried on interactive programme enhancements. The licensee is then referred to the ITC's policy statement on Interactive Services.

The Code now contains rules for licensee internet sites. Such websites are defined as programme-related services. As such, the sites must meet the criteria for editorial responsibility, advertising content and promotion as set out in the Section.

There are also new rules regarding mentioning of brands, in reference to prizes in game shows and viewers' competitions.

### **Recent ITC Rulings**

#### **Fairness**

An edition of "Trisha" included an item entitled "I Killed My Lover" and featured a one to one interview between Trisha and Diana Butler. Diana Butler talked about how she came to fatally stab her partner, Roger Carlin, in her home, in July 1996. She was subsequently found guilty of murder. The Court of Appeal later quashed her conviction and ordered a retrial at which she accepted the offer of a plea of manslaughter on the grounds of diminished responsibility on the basis that she had been a victim of domestic violence.

Roger Carlin's parents were contacted by the Trisha Programme prior to transmission, with a request for information about the court case. The family co-operated with the producers, supplying information and press cuttings. The parents asked if they could appear on the programme to put their son's side of the story across. However, Anglia did not agree to this request on account of Diana Butler's reluctance to appear with them. However they were asked to provide Anglia with questions that could be put to Miss Butler during the interview.

During the interview with Trisha, Diana Butler alleged that Roger Carlin was a violent alcoholic with whom she endured a pattern of domestic violence. She detailed events leading up to and including Roger's death.

Roger Carlin's family complained that the interview was unfair to the reputation of their dead son and did not take account of the distress it would cause them. They alleged that Diana Butler had been allowed to present herself as a victim of a violent relationship without Roger's side of the story being given.

Whilst the ITC accepted that Trisha did introduce some challenging elements to the discussion,

including two questions supplied by the Carlin family, it remained concerned about the extent and fairness of the unchallenged portrayal of Roger Carlin.

The ITC concluded that section 2.2(i) of the Programme Code had been breached. The programme presented Roger Carlin in an unfair light and did not give due consideration to the perspectives of his family.

### **Undue prominence**

ITC staff monitoring "Headless", the late night crime drama, noted a shot in which the camera panned to a close up of a can of Holsten Pils. When the can was turned so that the ring pull could be operated, the brand name was clearly displayed.

Channel 5 assured the ITC that there had been no external commercial influence on the production and that various drinks brands were included in this drama to add to its realism. The shot lasted less than 3 seconds and the accidental display of the brand name did not breach the Code.

Although accepting Channel 5's assurance, the ITC nevertheless felt that undue prominence had been given to the brand and preventative action should have been taken as a part of the compliance process. Other drinks brands had been present on set but none had been at the forefront of the screen.

The Code advises that products should not be "shown in close up or from any angle which displays the brand to best advantage". The ITC concluded that undue prominence had been given to this brand in breach of the Code.

### **Soft-soaped**

Carlton Central TV's "Weekend Live" included an item about the influence of television soap operas on people's lives. Some time after the broadcast it came to light that two of the people featured had proved to be hoaxers.

Though no viewer complained, ITC staff investigated and examined the in-house procedures of Carlton-Central for the avoidance of hoaxing. The broadcaster also carried out an internal enquiry into how the two hoaxers were engaged to appear on the programme. Both had signed a regular disclaimer form and programme research had not thrown up any reasons why the two people were not genuine. However, Carlton agreed that more effective pre-transmission checking could have avoided this. It advised the ITC that it would inform viewers by providing an apology in the programme at the start of the next series.

### **S Club TV**

A simple but effective procedure was introduced by Channel Television as the result of a complaint by a viewer who had been mistakenly included in S CLUB TV's "Little Devils" feature. In this particular edition, the presenter was seen stopping men in a shopping centre and tricking them into believing their flies were undone. The viewer complained that he had been filmed as part of this set up and was featured in the programme even though he had refused, at the time of filming, to give his consent to it being broadcast. He said that the inclusion of this film had caused him embarrassment.

Channel Television acknowledged that an error had been made. On the occasion of the filming, 53 people were filmed in a short space of time and clearances were sought from all. Unfortunately in

this case, the written description of the individual filmed was matched to the wrong clearance form. Immediately following the receipt of the complaint, Channel Television agreed to a new procedure replacing the written description with a Polaroid photograph.

The ITC considered that although this error represented a breach of section 2.8 of the Code, it was a genuine error and steps were immediately taken to prevent a recurrence. The ITC decided that in the light of the prompt and appropriate response, no further action was required.

## **LEGAL**

### **Editorial freedom of expression: Impact of the Human Rights Act**

Two recent decisions from the Court of Appeal have established a clear restriction on the ability of the Attorney General to fetter the freedom of the press as a consequence of the new Human Rights Act.

#### **Attorney General v Times Newspapers Ltd, and others**

The newspaper had previously undertaken not to publish information disclosed by a former employee of the Intelligence Service except to the extent that such information was in the public domain. In January 2001, the High Court granted a variation of the undertaking to permit the defendant paper to publish extracts of a book written by the former employee which had been published in Russia, once the book became 'generally accessible to the public at large' and thus entered the public domain.

The Attorney General appealed against this variation, arguing that the words 'generally accessible to the public at large' were too wide and should read to mean in circumstances where 'the defendant can demonstrate that the publication has come to the widespread attention of the public at large'.

In dismissing the appeal, Lord Phillips' decision turned on determining whether the relevant words should be preceded by the phrase 'where the defendant can demonstrate that.....'.

His Lordship examined Article 10 of the Convention for the Protection of Human Rights. Whilst Article 10(2) permitted in specified circumstances, a restriction on the right of freedom of expression, the restriction proposed by the Attorney General was disproportionate and could not be justified as being in the public interest in a democratic society.

It was held that there should be consultation between a newspaper and representatives of the security services before the publication of potentially sensitive and damaging material. However, it was not right to impose on the defendant the requirement that they should seek confirmation from the Attorney General or the court that the facts they intended to publish were sufficiently within the public domain. That was a matter on which an editor would be in a position to form his own judgment.

Inside two months of this decision the Court of Appeal reaffirmed this point in *Steen v Attorney General*. The case involved almost identical facts.

The editor of *Punch* magazine appealed against a decision that an article written by David Shayler, a former employee of the security service, had been published in contempt of court.

The Court of Appeal held that whilst publication of the article defeated the purpose of the injunction previously obtained by the Attorney General, it had not been shown that the editor had been aware that it would do so nor that he intended to damage national security, which was the purpose of the injunction. Crucially, it was again held that the requirement in the injunction to obtain the consent of the Attorney General for further publication was disproportionate to the public interest and therefore contrary to the Human Rights Act.

## Funny Money

Finally, the National Criminal Intelligence Service has issued a warning to advertising and film executives that it will prosecute if they continue to produce counterfeit money for use in productions, without permission from the Bank of England, which is finding its way into circulation through theft from film and TV studios.

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### further information:

If you would like more information about any of Goodman Derrick's Media Law services please telephone and ask to speak to a member of the Media Group.

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