

## GD MEDIA LAW BULLETIN 24

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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 is our first Bulletin since the implementation of Ofcom's Broadcast Code at the end of July. It is too soon to detect any noticeable changes or trends in Ofcom's application of the new Code, since the vast majority of recent decisions in the areas of Fairness and Privacy relate to programmes broadcast before the new Code came into effect. Meanwhile, Ofcom have been busy publishing Notes of Guidance on the new Code. The most recent edition of the Notes of Guidance (the 3rd) was published at the end of September 2005. These provide a useful, albeit non-binding, aid to interpreting and applying the Code.

Ofcom has also issued a Consultation on the procedures which it intends to adopt for the handling of Fairness and Privacy complaints. The closing date for responses is 23 December 2005.

Many readers will no doubt also be keenly awaiting Ofcom's promised Consultation on Product Placement, which is being undertaken in conjunction with an EC Consultation on the corresponding provisions in the "Television Without Frontiers" Directive. Ofcom's Consultation is due to be published before the end of the year.

### Separation of Programming

With the prospect of a long-term decline in spot advertising and Ofcom's anticipated review of the rules on product placement, it is timely to review three recent connected Ofcom decisions relating to the issue of separation of programmes from advertising and promotions.

### Promotions on E4

A viewer objected to a promotion which ran on E4 in August 2005 that stated: "The New Channel, Quiz Call, a new interactive quiz channel, is now available on Freeview, PRESS RED for information on how to receive it." This message took the form of semi-transparent text which appeared at the bottom of the screen when DTT viewers turned on their set top boxes and which remained in view for approximately 10 seconds. On pressing the red button viewers were shown instructions how to retune their Freeview boxes in order to receive this new channel. The ITC rules on cross-promotions (which are still in force) permit promotions which make reference to any other channel or related service which they provide to appear outside of advertising time, provided these are not excessive or distorting of fair competition (more detailed restrictions apply to promotions appearing on Channels 3, 4 and 5). Such promotions are primarily required to appear during promotional air-time, but self-evidently, this promotion would have appeared during programmes and advertisements. Notwithstanding this, Ofcom decided, perhaps not surprisingly, that this was a legitimate cross-promotion of Channel 4's new service.

### Top Up TV

The above decision is to be contrasted with a complaint recently upheld against Five concerning

the promotion in its air time of the Top Up TV Service. In this case, 64 viewers objected to the on-screen appearance of a message overlaid across the Five service. Again, this appeared only when DTT viewers tuned in to Five, albeit that it appeared on screen for 20 seconds. The message stated "Your TV may now be able to receive more Channels. Press the RED button to find out how." Upon pressing the red button viewers were shown a screen promoting Top Up TV, which is a pay TV Service available to DTT viewers. The complainants objected that this was an inappropriate promotion of a commercial service. Five argued that the information contained in the message was more advisory in nature than promoting a commercial service. There was no requirement for viewers to access the red button for further information and this was merely advising viewers of the additional services that were available to DTT viewers. It was therefore more akin to a viewer information announcement.

Ofcom recognised that it would from time to time be necessary to inform DTT viewers of new channels becoming available on the platform and of the need to reset their boxes in order to receive them. However, from the tone of the report, Ofcom appear to have regarded the on-screen message as somewhat misleading since although it gave the impression of a general announcement of the availability of additional services, it became apparent on pressing the red button that this was essentially an advertisement for Top Up TV which was therefore in breach of s8.1 of the old Programme Code. Ironically, following the recent announcement that Five has taken a stake in Top Up TV, the promotion might now be permissible on the grounds that its services are related to Five's.

### **Sky Prem Plus**

The last example was a case involving human error. During live coverage of Charlton –v- Manchester City on Prem-Plus in April 2005, a red button icon appeared in the top right-hand corner of the screen accompanied by the text "Press to see more of the all new Ford Focus." A viewer complained that the inclusion of the icon amounted to inappropriate commercial activity within a programme. Sky explained that the icon in question was supposed to play out over a Ford Focus advertisement that was scheduled to appear during an advertising break during half-time. However, the kick-off had been delayed and as a result, the first half ended late which meant that the advertising breaks had to be put back. Unfortunately, the promotional information was not rescheduled with the result that it appeared over the match coverage, out of sync with the intended advertisement.

Apart from the human error aspect, Sky argued that although the icon would have briefly overlapped with the programme, it would have been readily apparent to viewers that it did not form part of it and so there would have been no risk of it being confused with the actual programme. Hence, the inclusion of the icon did not amount to a breach of the rules on separation and scheduling of advertising.

Ofcom was not impressed by this argument and relied on a literal interpretation of the Code and the TWF Directive which requires that television advertising should be readily recognisable as such and kept quite separate from programmes by whatever means appropriate. However, because this was clearly a genuine technical error, Ofcom were happy to treat the matter as resolved and did not take any further action.

### **Gypsies and Travellers**

The publicity in some sections of the tabloid press given to recent activities of gypsies and travellers in various parts of the UK has led to several intemperate outbursts by their radio counterparts. The presenter of a morning slot on Gemini FM in July 2005 challenged one of his colleagues, on air, to drive to a site where 50 travellers had recently set up camp, to shout "get a job" at them and then drive off, having first offered to sell them some tent pegs. Gemini later

broadcast the challenge being carried out. A listener complained that this item could incite racial harassment. Gemini launched an investigation and 11 days later issued an on-air apology. In response to an article in The Sun as part of its campaign concerning the travelling community, a presenter on Essex FM and his co-host made a number of disparaging remarks about travellers and their presence in the local community during their breakfast show on 10 March 2005. The presenter said "Bang goes the neighbourhood, one minute you look out of your house and your seeing beautiful fields, gorgeous meadows, next thing you know there is a gypo camp on your doorstep, with gypsy camps comes trouble - your not allowed to say that apparently, but come on seriously nothing good ever comes out of it." This also solicited a complaint about racist incitement and offence. An investigation was launched by Essex FM, although curiously this apparently did not result in an apology being broadcast.

Lastly, during a review of newspapers on LBC in September 2005, the presenter picked up on a story about gypsies gaining entry into a field. He went on to make a distinction between gypsies and travellers saying of the latter "Nobody likes travellers – filth, dirt, inbreeding – dreadful." Again, not surprisingly this resulted in a complaint. An apology was issued on-air later that day.

In all three cases Ofcom understandably took a very dim view of these ill-judged outbursts, but in each case appeared to be satisfied by the steps taken by the broadcasters themselves, such that they did not feel impelled to impose any further sanction. The likelihood of similar laxity being applied towards television broadcasters in these circumstances seems unlikely. Conversely it seems that no censure is ever applied to the tabloid newspapers which regularly publish material of this nature.

### **Political Advertising**

Readers will be aware that the BCAP Television Advertising Standards Code (giving effect to s321 of the Communications Act 2003) forbids any advertising on television of a political nature. This prohibits both advertising on behalf of a body whose objects are "wholly or mainly of a political nature" or advertisements which are "directed to a political end". For these purposes "political" is very widely defined. It includes bringing about changes in the law or otherwise influencing the legislative process, or influencing the policies of local, regional or national Government, whether in the UK or elsewhere.

Therefore, in addition to advertisements for political parties, any advertising on behalf of a wider cause is prohibited.

Thus perhaps not surprisingly an advertising campaign undertaken by the "Make Poverty History" Movement (MPH) during March 2005 was found to offend the prohibition on political advertising. After an exhaustive investigation Ofcom concluded that MPH, though an amorphous entity, is a political body for the purposes of the prohibition and that its objectives were of a political nature. It was also satisfied that the campaigning objectives of MPH were directed towards a political end for these purposes. Accordingly, the broadcast of these commercials was found to be in breach of the prohibition on political advertising in the BCAP Code.

Subsequently, Animal Defenders International (ADi) submitted a proposed advertisement to the Broadcast Advertising Clearance Centre ("BACC") for broadcast on commercial television. This was directed towards the plight of animals kept in zoos and campaigned for their better treatment; it was clearly intended to test the ban on political advertising. Following the earlier clear guidance given by Ofcom in the MPH case, BACC (for whom we act) declined to clear the advertisement for broadcast. ADi responded to this by seeking leave to apply for judicial review against both the BACC's refusal to clear their advertisement and also against DCMS and Ofcom for the original imposition of this ban on political advertising. ADi contends that the ban is excessive and amounts to an infringement of its rights to freedom of expression under Article 10 of ECHR. DCMS is expected to argue that the ban is necessary in order to avoid the politicization of advertising and to maintain a level playing field between political parties. Leave for judicial review has been granted and the full application should be heard sometime early next year.

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## LEGAL

### Serious Organised Crime and Police Act 2005 ("SOCA")

A number of important provisions of this Act have recently come into force:-

1. S141: This removes the automatic right of anonymity previously enjoyed by youths appearing in a Youth Court when charged with breaching an ASBO. As a result, Magistrates wishing to give the youth anonymity will have to specifically impose an order under s39 of the Children and Young Persons Act 1933 ("CYPA"). Previously, proceedings for breach of an ASBO were covered by the automatic anonymity order contained in s49 CYPA. Unfortunately, this still does not resolve the difficulty which arises where Magistrates impose an ASBO after the conclusion of criminal proceedings in a Youth Court, where it is not possible for journalists to report the circumstances which gave rise to the imposition of the ASBO since those earlier proceedings are protected by s49. This difficulty can only be overcome if when imposing the ASBO the Magistrate specifically recites the circumstances which have led to its imposition. These can then be reported as part of the ASBO hearing.
2. S125: This amends the Protection Against Harassment Act 1997 to create an additional offence of harassment consisting of being outside or in the vicinity of someone's home with the intention of persuading that person (or another in that house) not to do something he or she is entitled to do or conversely to do something that he or she has no obligation to do. This will constitute an offence if the person "intends" his presence to cause alarm or distress. It is feared that this could be used to penalise journalists who are involved in a "stake-out" or are attempting to do a doorstep interview.
3. S128: This creates a statutory offence of trespass on Crown Land or on a designated site, in other words a site which has been specified by the Home Secretary for this purpose. Previously, such a trespass amounted only to a civil tort with the result that an infringement or contravention had very limited practical consequences. However, if the trespass in question is on Crown Land or over a designated site, this will constitute the action as a criminal offence which could have very important ramifications for the trespassers. It would also be a serious blow to any argument that a journalist was acting reasonably if his/her conduct has involved the commission of a criminal offence. The prohibition in relation to Crown Land applies with immediate effect, which probably spells the end of "Fathers 4 Justice" stunts at Buckingham Palace. As yet, no other sites have been designated by the Home Secretary.

### And Finally ...

Endemol has recently incurred the wrath of the Dutch Animal Protection Agency. Endemol was filming a world record attempt at domino stacking. Over the course of a month a hundred people had been involved, carefully positioning no less than 23,000 dominos. Unfortunately, the warehouse they used was not sealed; an intrepid sparrow managed to gain access to the site and knocked over a domino, thereby setting off the whole collection! The sparrow was promptly chased into a corner and was then ... shot dead. It turned out to be a common house sparrow which is apparently an endangered species in Holland. The authorities are investigating ...

Spare a thought also for the proprietors of West FM in Scotland. Two listeners to this service complained about their "Red Light Lottery" competition in which listeners were encouraged to phone in from their cars while waiting at red lights and then had to remain stationary when the lights turned green with the incentive that they would receive £5.00 for every car horn that could then be heard on air. Not surprisingly Ofcom took a rather dim view of such inconsiderate conduct.

This of course pales into significance against the £125,000 fine imposed by Ofcom against Piccadilly's Key FM for several flagrant taste and decency contraventions, widely reported as this Bulletin was going to print.

### **Music to your ears**

Goodman Derrick is pleased to announce that we have secured the services of consultant Nora Mullally, a specialist music lawyer. Nora has a wealth of experience, gained from both in-house and private practice positions, in all areas of music copyright, contracts and performing rights. Her specialist knowledge makes her a welcome addition to our Media Department.

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**This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.**

### **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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