

## **New OFCOM broadcasting code**

**Ofcom has recently published its new Broadcasting Code for television and radio. The new Code, which condenses the six codes inherited from Ofcom's broadcasting predecessors, comes into force on 25 July 2005. Giles Crown a Partner in the Media, Brands and Technology department at Lewis Silkin examines the consequences.**

In addition to rules relating to fairness, privacy, harm and offence and the protection of under-eighteens in programming, the Code also sets out revised rules on sponsorship and commercial references in programmes.

As the Forward to the new Code makes clear, it has to be viewed against a backdrop of European regulation mainly contained in the Television Without Frontiers Directive. Discussions have started on revisions to the Directive, which has not been substantially altered for more than a decade. The Directive contains prohibitions on product placement and 'surreptitious advertising'. As the UK must comply with the Directive, there is a limit to the extent of permissible deregulation in this area until the Directive itself is changed.

### **Sponsorship and commercial references**

Whilst the ban on product placement remains in force, Ofcom has acknowledged the pressure on traditional broadcast advertising as a key source of funding for commercial broadcasters and will consult on this issue in the context of a wider assessment of the broadcast advertising market later in the year. In the area of sponsorship and commercial references, Ofcom claims to have deregulated significantly whilst ensuring at the same time that the overriding principle of editorial independence is maintained.

### **Key principles**

The key principles for sponsorship are:

- transparency – to ensure sponsorship arrangements are transparent;
- separation – to ensure that sponsorship messages are separate from programmes and to maintain a distinction between advertising and sponsorship;
- editorial independence – to ensure that the broadcaster maintains editorial control over sponsored programmes and that programmes are not distorted for commercial purposes.

The key principles for commercial references are:

- to ensure that the independence of editorial control over programme content is maintained and that programmes are not distorted for commercial purposes;
- to ensure that the advertising and programme elements of a service are clearly separated.

**Main changes: sponsorship**

The main changes from the previous rules relating to sponsorship are as follows:

- The ban on TV sponsorship of news and current affairs programmes remains. Short specialist reports following a news programme – including sport, travel and weather reports – may be sponsored.
- It would seem that it may now be possible to sponsor whole television channels as well as station presentation or continuity and consumer advice programmes. However, the choice of sponsor for consumer advice programmes may be limited where the sponsor's products or services are likely to be featured in the programme. A positive review of the sponsor's product in the programme could be seen as promotional for the sponsor, and the exclusion of the sponsor's product from the programme could amount to an unacceptable influence on the editorial content.
- Betting companies may now sponsor programmes that include coverage of horse or greyhound racing, or the results of such racing, and gaming companies may sponsor television game shows that closely resemble the gaming that takes place in bingo halls and casinos. Neither may sponsor programmes aimed at children under eighteen.
- Non-promotional references to the sponsor and its products and services are permitted if editorially justified and incidental. Promotional references include references that encourage the purchase or rental of a product or service. References are more likely to be acceptable if they appear to occur naturally within the programme. A reference to the sponsor within a programme must not be a condition of the sponsorship arrangement. A sponsor must also not have any direct or indirect interest in the editorial content of the sponsored programme.
- As a result of allowing non-promotional references to sponsors, the former detailed exceptions relating to references to sponsors during the coverage of bona fide events, masthead programmes and on single interest channels have gone.
- The ban on presenters of unsponsorable programmes, such as news and current affairs, from being visually used in sponsored programmes scheduled adjacent to the unsponsorable programme in which they have appeared has gone. The specific ban on credits featuring, in voiceover or vision, station continuity presenters or announcers or programme presenters or performers (including animated characters) has also gone.
- The sponsored programme must be clearly identified as such by reference to the name and/or logo of the sponsor at the beginning and/or end of the programme. The relationship between the sponsor and the sponsored programme must be transparent. Otherwise, broadcasters are free to use various and different creative messages to identify sponsorship arrangements, provided they do not suggest the sponsorship arrangement has in any way compromised the requirements of the Code. The express ban on the phrase "brought to you by" in credits has gone. The 5 second time limit for references to sponsors in programme trailers has also been removed.

- Credits must be clearly separated from advertising, must not contain advertising messages or calls to action and must not encourage the purchase or rental of the products or services of the sponsor of a third party. Sponsors may now include basic contact details and mandatory price information in credits, as long as these do not form part of an advertising message. Any price information that is not mandatory will normally be considered as an advertising message.
- The prohibition on companies funding any programme with which they are involved through merchandising agreements to produce products based on programme characters or other elements of the programme has been removed. The specific time limits on front and end credits has also been removed.
- Most of the former specific rules relating to the content of sponsorship credits have gone, such as: the requirement that any use in credits of the sponsor's product must help to reflect the link between sponsor and the programme; the ban on inclusion in credits of any extracts from recent ad campaigns; the ban on specific references in credits to the attributes or benefits of the sponsor's products or services, and the prohibition on credits resolving promotions in other media.
- The separation of programmes and sponsorship may now be achieved either through temporal *or* spatial means (e.g. through the use of split-screens). Where credits are spatially separated from the sponsored programme it must be clear that the credit does not form part of the programme. In addition, the size and duration of the credit should be limited to avoid giving undue prominence to the sponsor.

#### **Main changes: commercial references**

The main changes from the previous rules relating to commercial references in programmes are as follows:

- A new rule simply states that products and services must not be promoted in programmes. This maintains the distinction between advertising and programming. Products and services are promoted where there is a clear 'sell', for example, where information is provided about prices or other specific attributes of the product.
- Undue prominence and product placement remain prohibited.
- Undue prominence may result from the reference to a product or service in a programme where there is no editorial justification or from the manner in which a product or service appears or is referred to in a programme.
- It is acknowledged that brands are an integral part of modern society and that this will inevitably be reflected on television and radio as it is in other media. Therefore, there is no absolute prohibition on the appearance of, or reference to, branded products and services within programmes. Editorial justification will depend on the nature of the programme and there may be certain types of programmes – e.g. sports and music coverage in television programmes – where there is a general acceptance that brands will feature.
- References to products or services acquired at no, or less than full cost, where their inclusion within the programme is justified editorially, is not considered to be product placement.

- In addition, arrangements covering the inclusion of products or services in a programme acquired from outside the UK and films made for cinema are not considered to be product placement, provided that the broadcaster does not directly benefit from the arrangement. This significantly widens the previous acquired programmes exemption, which related only to films and events taking place outside the UK.
- References to brands within competitions must be brief and secondary. References to the brand of a prize or its main features are likely to be justified. Competitions should not, however, be used as advertising platforms for the prizes or the prize donors. Prize references should not sound nor look like advertisements. There is no limit on the length and duration of branded prize references, provided they comply with the rules on undue prominence. The specific rules on advertiser references in game shows and competitions – such as descriptions of prizes in a non-promotional manner, the limit of two mentions of the prize brand where editorially justified, and references to the brand in competitions only when details of how to enter are given – have gone. Sponsors can now donate their own products or services as prizes in competitions in programmes they are sponsoring.
- Advertising must be clearly separated from programmes. The specific rule relating to close similarity between advertising and programming having an unacceptable promotional purpose – such as the use of characters created for advertising or marketing purposes in a programme - has gone.
- All the specific rules relating to the references to brands and branding in event coverage have gone.
- A new rule prohibits broadcasters from broadcasting appeals for donations to make programmes or fund their services.
- Virtual advertising at an event must be notified to viewers in advance, may only replace existing on-site advertising and be no more visible or conspicuous than the actual advertising at the venue. Broadcasters may not trade in virtual advertising.

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This commentary is for general guidance only and should not be relied upon. Specific advice should be sought in relation to each set of circumstances.