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From: BSA <codereview@bsa.govt.nz>
Sent: Thursday, 27 August 2015 4:26 p.m.
To: [REDACTED]
Subject: BSA Code Review feedback

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Thanks

Thank you for making a submission to the Broadcasting Standards Authority about its code review.

The consultation period will close on **31 August 2015**.

After review and consideration of submissions, we will publish a summary of submissions on our website. You will be notified by email when this summary is available.

We welcome feedback about our public consultation process. If you would like to complete a short survey about how you found this process, please [click here](#).

Thank you for taking the time to consider our code review, and please email us at info@bsa.govt.nz with any questions.

Kind Regards,
BSA

Your Submission

Feedback Summary

Introduction & Commentary — Commentary On The Standards

<http://bsa.govt.nz/code-review/131-introduction-commentary/7794-commentary-on-the-standards>

My chief concern with these guidelines relates to the sentence below:

“Violent material is readily available on the internet and the attitudes in our society are such that it is accepted that material of this kind ought to be able to be accessed on television, provided there are strong protections to prevent it being viewed by children and young people, and strong protections to ensure that it is not inadvertently viewed by those who do not wish to do so.”

On what basis is the BSA making the claim that “the attitudes in our society are such that it is accepted that material of this kind ought to be able to be accessed on television”? Can the BSA point to clear NZ-based research to back up this claim?

I raise this question because, in my experience, there is widespread societal concern about the levels of violence on television. This is unsurprising given that multiple studies have shown a link between the consumption of violent imagery and aggression. I would expect BSA to be pro-active in investigating those studies and societal views about this issue in general. In contrast, the sentence cited gives the impression that the BSA has already decided that a certain level violence on television is acceptable and closed its mind to any other position.

Finally, the fact that material is available on the internet seems irrelevant in this context. There is plenty of material on the internet breaching all of the BSA standards; it doesn't seem to follow that broadcasting standards should be accordingly lowered.

Guidance — Privacy Guidance

<http://bsa.govt.nz/code-review/135-guidance/7789-privacy-guidance>

Privacy Guidelines

The law of privacy and the media is my academic speciality. I am the principal editor of the Commonwealth's major work on the subject and have written numerous articles about it in leading international journals.

On the whole, if I might say so, I think that these guidelines strike an appropriate balance between privacy and freedom of expression. I would however make the following comments:

Identifiability

1. Audio-visual footage

I can understand why the BSA would wish to create a bright-line rule around identifiability. And I agree that it is an entirely appropriate requirement where the broadcast of private facts are concerned. But, in my view, this standard needs to take account of the fact that there are some situations where audio-visual footage can seriously undermine privacy even if the subject is not identifiable. Take the following examples:

A couple are rushing to hospital so that the woman can give birth. They don't make it and she ends up having to give birth on the side of the road. A passerby videos the birth on his mobile phone and sends it to a television station which broadcasts it on the news. The woman's face is pixelated but you can hear her groans and cries, you can see the how the birth progresses, you see her sitting with her legs apart and you see the baby soon after it emerges covered in blood and vernix.

Or:

The sexual assault of a woman is caught on a CCTV camera. A broadcaster disseminates the footage on television. The woman's face is effectively pixelated.

Or:

A woman is videoed using a toilet. Her face and intimate body parts are pixelated.

According to the BSA standards, none of these broadcasts would breach the privacy of the woman concerned because she could not be identified. It would need to rely on other standards to take action against the broadcaster. This is counter-intuitive. Even if he or she can't be identified it would be an egregious breach of privacy to show a person giving birth, being sexually assaulted, or using a toilet. This is not because of the information being disclosed but because the viewer gets to see the person at a highly intimate time. The humiliation might be worse without pixelation but that doesn't mean that pixelation stops the broadcast from being seriously humiliating.

In light of this, I would suggest that the BSA needs to recognise that identification is not necessarily always required for there to be a reasonable expectation of privacy in respect of an audio-visual recording. As a minimum, I would suggest that the guidelines be changed to read, "Except in exceptional circumstances, privacy will only be breached where the individual whose privacy is at issue is identifiable in the broadcast."

2. Individuals who know about the event in question

"Privacy will only be breached where the individual whose privacy is at issue is identifiable in the broadcast. Individuals must be identifiable beyond family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast (refer to BSA decision: Moore and TVWorks Ltd, 2009-036)."

This statement assumes that a person's objection to being depicted in a broadcast is always going to be to what information it imparts about him or her. It is no problem, it says, if a person is identified in a broadcast by people who knew about the incident in question because they knew about the matter already. But Moore misses the point that people often don't mind others knowing that something happened to them but would be very distressed if those same people saw it happening.

Take, for example, X who has a heart attack and had to be attended by paramedics. Ride-along cameras film the whole thing and the footage is broadcast. X's face is pixelated but everyone who knew about the incident recognised him in the footage. According to Moore, this is okay because viewers didn't learn any new fact about X. But this is to ignore the fact that the broadcast enabled all those people to see him in a vulnerable state –panicking about what is happening to him, receiving treatment, being changed into a hospital gown etc. It is one thing to tell your family and friends that you have had a heart attack but quite another for them to see you receiving treatment for it against your wishes.

Although I can see the attraction of a bright-line rule here, I think these guidelines need to acknowledge the difference between factual and visual breaches of privacy. As a minimum, I would suggest that this sentence should be changed to read: 'Individuals must be identifiable by people other than those closest to them (eg close family and friends)'.

Reasonable expectation of privacy

I welcome the recognition that people can have reasonable expectations of privacy in public places in certain, specified circumstances.

Highly offensive disclosure

2 Disclosure of private facts is likely to be highly offensive where:

- it is done for the purpose of encouraging harassment

- the material is particularly embarrassing, sensitive or traumatic, or has the potential to impact negatively on reputation
- the person is particularly vulnerable
- the broadcast is exploitative or gratuitous
- the person concerned has made efforts to protect his or her privacy, or has not consented to the broadcast.

In my view, inclusion of the ‘high offensiveness’ requirement is unnecessary if the reasonable expectation of privacy test is being properly applied. Its inclusion suggests that the fact that information or footage is a breach of privacy is not enough on its own – there has to be some extra “bad” element before it is a breach of the standards. This is a problematic message. If we are really taking privacy seriously then why isn’t it enough that something that the broadcaster should have known was private – and which is not in the public interest – was broadcast to the world. It is noteworthy in this regard that three NZ appellate judges have suggested that the ‘high offensiveness’ requirement is unnecessary in context of the privacy tort (see Tipping J in Hosking, and Young P and Elias CJ in Rogers).

If the ‘high offensiveness’ requirement is to be retained, the list provided in these guidelines is necessary to give the concept some meaning. In my view, the factors it identifies should all be interpreted broadly (including the final factor that ‘the person concerned has made efforts to protect his or her privacy, or has not consented to the broadcast’). It should be a rare thing for a broadcaster’s breach of privacy to be regarded as inoffensive to the person concerned.

The need for greater action around intrusion into private grief

I welcome acknowledgements in the BSA standards that broadcasters should avoid intruding into private grief. My colleague, [REDACTED], are working on an empirical study into the impact of intense media interest on the family members of the men who died at Pike River. The level of intrusion they describe is very concerning and had a serious impact on the well-being of the individuals caught up in it. Our research also suggests that this kind of reporting is becoming more and more common.

Because enforcement of the BSA standards depends on receipt of a complaint, broadcasters are rarely sanctioned for such intrusions into grief. None of the 17 people we spoke to about Pike River brought a complaint to the BSA or anyone else. Those whom we asked directly about it were unaware of the mechanisms for making a complaint and said they would have been too caught up in other matters to have been able to do so anyway.

It would be highly desirable for the BSA to take a more proactive role in protecting individuals who find themselves the subject of media interest at times of grief or trauma. Regulators in the UK have powers of to intervene in these situations off their own bat and those powers can be used to good effect. This proactive approach seems more consistent with the role of a regulator – it would enable the BSA to intervene to moderate media behaviour when it sees that there is a problem rather than simply wait and see if a complaint come in. (It is noteworthy that Lord Justice Leveson criticised the UK Press Complaints Commission for taking too passive an approach to phone hacking.) An extension of the BSA’s powers to include such an ability would therefore be very welcome.

Overall, how well does the draft codebook reflect your values and expectations for broadcasters?
well

Overall, how easy is the draft codebook to understand?
easy

Overall, how satisfied are you with the new draft codebook?
satisfied

Final Comments

Please see the feedback above.

Publishing Rights

yes

Name

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